TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 497.

WALTER S. TANKARD, PLAINTIFF IN ERROR,

vs.

MOSES FEATHERSTEIN AND ABRAHAM ROSENSTEIN.

IN ERROR TO THE CITY COURT OF NEW YORK CITY, STATE OF NEW YORK.

FILED MARCH 11, 1914.

(20,174)

(25,174)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 407.

BALTRUS S. YANKAUS, PLAINTIFF IN ERROR,

vs.

MOSES FELTENSTEIN AND ABRAHAM ROSENSTEIN.

IN ERROR TO THE CITY COURT OF NEW YORK CITY, STATE OF NEW YORK.

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1 Supreme Court, Appellate Term, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Papers on Appeal from Judgment and Order.

Edward G. Delaney, Attorney for Defendant-Appellant, 154 Nassau Street, Borough of Manhattan, N. Y. City.
Virginius Victor Zipris, Attorney for Plaintiffs-Respondents, 309 Broadway, Borough of Manhattan, N. Y. City.

2 City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

Statement.

Appeal from judgment of City Court of the City of New York, entered October 26, 1915, in favor of plaintiffs and against defendant, for the sum of $882.78; and from order entered therein on October 25, 1915, which will be brought up for review upon said appeal.
Action begun by service of summons and complaint on October 11, 1915.
Petition and Bond on removal filed October 16, 1915.
Preliminary notice of such removal given and served October 15, 1915.
Notice of motion to set aside Bond and Removal, and to reject Petition, etc., dated October 16, 1915.
Decision and Opinion of Justice of the City Court of the City of New York, upon the motion, October 22, 1915.
Order of Justice La Fetra on the motion, dated October 25, 1915, and entered that day.
Judgment entered by plaintiffs against the defendant in City Court of the City of New York, on October 26, 1915, for $882.78.
Notice of appeal from above judgment and order, filed and served November 5, 1915.
Certificate of Clerk, dated November —, 1915.
The names of the original parties to the action are as above set forth, and no change has taken place therein.
Virginius Victor Zipris, attorney for plaintiffs-respondents.
Edward G. Delaney, attorney for defendant-appellant.

Notice of Appeal.

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

SIRS: You will please take notice, that the defendant, Baltrus S. Yankaus, hereby appeals to the Appellate Term of the Supreme Court, First Department, from the judgment filed and entered herein, in the office of the Clerk of the City Court of the City of New York, on the 26th day of October, 1915, for the sum of Eight Hundred and Eighty-two and 78/100 ($882.78) Dollars, in favor of the
3 plaintiffs, Moses Feltenstein and Abraham Rosenstein, and against the said defendant, Baltrus S. Yankaus, and from each and every part thereof, upon the ground that this Court did not on said date, nor at any time, possess or acquire jurisdiction over the subject matter of this action, or over the said defendant.

And the said Baltrus S. Yankaus, the defendant aforesaid, will bring up for review upon said appeal, and hereby appeals to the said Appellate Term of the Supreme Court, from the order of Mr. Justice Edward B. La Fetra, one of the Justices of this Court, dated October 25, 1915, and filed herein on that day, setting aside the removal of this action to the District Court of the United States, for the Southern District of New York, and declaring that said action was not removable to said District Court of the United States, and that this Court does continue to retain jurisdiction of this action, as though such removal had not been made, and as more particularly set forth in said order. And said defendant appeals from the whole of said judgment and order, and from each and every part thereof.

Dated, New York, November 5, 1915.

Yours, etc.,

EDWARD G. DELANEY,
Attorney for Defendant for the Purpose of Appeal.

Office & P. O. Address, 154 Nassau Street, Borough of Manhattan, City of New York.

To Virginius Victor Zipris, Esq., Attorney for Plaintiffs. Thomas F. Smith, Esq., Clerk of City Court of the City of New York.

JUDGMENT ROLL.

Summons, with Notice.

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
vs.
BALTRUS S. YANKAUS.

To the Above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within six days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, Oct. 8, 1915.

VIRGINIUS VICTOR ZIPRIS,
Plaintiff's Attorney.

Office and Post-Office Address, 309 Broadway, Borough of Manhattan, New York City.

4 *Complaint.*

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

Plaintiffs, complaining of the defendant, by Virginius Victor Zipris, their attorney, allege:

For a First Cause of Action.

1. That at all the times hereinafter mentioned the above named plaintiffs were and still are attorneys and counsellors at law, duly admitted to practice in all the Courts of this State, and at all the times hereinafter mentioned were and still are co-partners practicing law under the firm name of Feltenstein & Rosenstein.

2. Upon information and belief, that at all times hereinafter mentioned, the above named defendant was an attorney and counsellor at law, duly admitted to practice in the United States District Court, Eastern District of New York.

3. That prior to May 4th, 1914, the above named defendant retained the above named plaintiffs to act as counsel for him in cases then pending in the said United States District Court, Eastern District of New York, entitled Kietoenos Yanulionis vs. Inter-borough

Rapid Transit Company, and Frank Kaupis vs. Jamison, doing business as Arbuckle Brothers.

4. That on or about May 4th, 1914, the above named plaintiffs and the defendant entered into an agreement as follows:

"United States District Court, Eastern District of New York.

KIETOENOS YANKULINOIS, Plaintiff,
against
INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.

FRANK KAUPIS, Plaintiff,
against
ARBUCKLE BROTHERS, Defendant.

It is understood and agreed in the above entitled actions that Baltrus S. Yankaus, the attorney for the plaintiffs, does not desire Moses Feltenstein to further act as counsel for the plaintiffs in the above entitled actions, and hereby revokes the retainers made herein.

It is understood that Moses Feltenstein hereby agrees to retire from both of the above entitled actions and for services rendered by said Moses Feltenstein, Baltrus S. Yankaus, hereby agrees to pay him, the said Moses Feltenstein, the sum of $1,000, out of the proceeds in said cases, or either of them.

Dated, New York, May 4th, 1914.

B. S. YANKAUS.
MOSES FELTENSTEIN."

5. Upon information and belief that the case of Kaupis vs. Arbuckle Brothers was thereafter settled for the sum of $12,000, of which defendant herein received as his share Six Thousand ($6,000) Dollars.

6. That said defendant paid to plaintiffs herein on account of the said One Thousand ($1,000) Dollars, the sum of Five hundred ($500) Dollars.

7. That at all the times hereinafter mentioned the fees earned by said Moses Feltenstein, belonged to and became the property of the above named plaintiffs.

8. That no part of the rest of the said One thousand ($1,000) Dollars has been paid although duly demanded and there is now due and owing to the plaintiff the sum of Five hundred ($500) Dollars.

For a Second Cause of Action.

9. That plaintiffs duly allege and make part hereof paragraphs marked "1" and "2" of the first cause of action herein as though here fuly set forth.

10. That on or about May 12th, 1914, at the special instance and request of the defendant, the above named plaintiffs loaned and advanced to the said defendant, the sum of Two hundred ($200) Dol-

lars, which the said defendant promised and agreed to pay on demand.

11. That the plaintiffs have duly demanded the aforesaid sum, but no part thereof has been duly paid.

For a Third Cause of Action.

12. That plaintiffs duly allege and make part hereof paragraphs marked "1" and "2" of the first cause of action herein as though here fully set forth.

13. That on or about July 30th, 1914, the above named plaintiffs at the special instance and request of the defendant, loaned and advanced to the said defendant the sum of One hundred ($100) Dollars, which the said defendant promised and agreed to pay on demand.

14. That the plaintiffs have duly demanded the aforesaid sum, but no part thereof has been paid.

Wherefore, plaintiffs demand judgment against defendant herein for the sum of Eight hundred ($800) Dollars with interest, besides costs and disbursements of this action.

VIRGINIUS VICTOR ZIPRIS,
Attorney for Plaintiffs.

#309 Broadway, Manhattan, New York City.

6 STATE OF NEW YORK,
City and County of New York, ss:

Moses Feltenstein, being duly sworn, deposes and says that he is one of the plaintiffs in the within entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

MOSES FELTENSTEIN.

Sworn to before me this 8th day of October, 1915.

ROSE ADLER,
Notary Public, Bronx County.

Cert. filed in New York Co.

Affidavit of Service of Summons and Complaint.

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles Somberg, being duly sworn, says that he is twenty-one years of age, and that on the 11th day of October, 1915, at 154

Nassau Street, Borough of Manhattan, City of New York, he served the summons and complaint in this action, hereto annexed, upon Baltrus S. Yankaus, defendant in this action, by delivering a copy of said summons and complaint to such defendant personally, and leaving the same with him.

He further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as defendant in this action.

CHARLES SOMBERG.

Sworn to before me this 22nd day of Oct., 1915.

DAVID HARTMAN,
Comm. of Deeds, City of New York.

7 *Statement for Judgment.*

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

Amount claimed in Summons	$800.	
Interest	64.	
		$864.
Costs by Statute	15.	
Defendants served with Process ($2.00 each)		
Affidavits		
Transcripts and Docketing	.18	
Serving Complaint and Summons	1.	
Clerk's Fees entering Judgment	.50	
Postage		
Sheriff's Fees on Execution	1.85	
Satisfaction Piece	.25	
		$18.78
Total		$882.78

CITY AND COUNTY OF NEW YORK, *ss:*

Abraham Rosenstein, being duly sworn, says that he is one of the plaintiffs in the above action; that the disbursements above mentioned have been made in said action or will be necessarily made or incurred therein; that the time for the defendant to appear, answer or demur herein has expired, and that said defendant has not appeared or answered or demurred herein, except that defendant by attorney filed an undertaking and petition on removal to the United States District — and also gave notice thereof to plaintiffs and on motion of plaintiffs said removal or attempted removal has been set aside, and this Court retained jurisdiction by an order made this day.

ABRAHAM ROSENSTEIN.

Sworn to before me this 26th day of October, 1915.

SAMUEL ZIPRIS,
Notary Public, N. Y. Co.

Judgment.

NEW YORK, October 26, 1915.

The summons and complaint in this action having been personally served on Baltrus S. Yankaus, the defendant, on the 11th day of October, 1915, and the time for said defendant to appear, answer or demur herein having fully expired, and said defendant not having appeared or answered or demurred herein, except that defendant, by attorney, filed an undertaking and petition on removal to the United States District — and also gave notice thereof to plaintiffs, and on motion of plaintiff-, said removal or attempted removal has been set aside and this court retained jurisdiction by an order made this day.

Now, on motion of Virginius Victor Zipris, plaintiffs' attorney, it is hereby adjudged that Moses Feltenstein and Abraham Rosenstein, the plaintiffs, recover of Baltrus S. Yankaus, the defendant, the sum of Eight hundred and sixty-four ($864) Dollars, the amount claimed and interest, with Eighteen and 78/100 ($18.78) Dollars, costs and disbursements, amounting in the whole to the sum of Eight hundred and Eighty-two and 78/100 ($882.78) Dollars, and that said plaintiffs have execution therefor.

THOMAS F. SMITH, *Clerk.*

8 *Order of La Fetra, J., Appealed from, Forming Part of Judgment Roll.*

At a Special Term, Part I, of the City Court of the City of New York, Held at the Court House, No. 32 Chambers Street, in the Borough of Manhattan, City of New York, on the 25th Day of October, 1915.

Present: Hon. Edward B. La Fetra, Justice.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

Upon reading and filing the notice of motion herein, dated October 16th, 1915, the affidavit of Abraham Rosenstein, verified the same day, the complaint in this action, the petition of the defendant and one Edward G. Delaney, both verified October 15, 1915, the defendant's notice dated October 15, 1915, stating that said petition and a bond for removal would be filed on October 16th, 1915, and the affidavit of Edward G. Delaney, verified October 20th, 1915.

Now, after hearing Abraham Rosenstein, one of the plaintiffs in support of the application, and Edward G. Delaney, the attorney for defendant, in opposition, it is

Ordered that the removal or attempted removal of this action to the District Court of the United States in and for the Southern District of New York, be set aside, and this Court does hereby determine that this action is not one entitled to be removed to said Court, and that this Court hereby declares that this action is and was not properly removable to the said District Court of the United States and this Court does continue to retain jurisdiction of this action as though such removal had not been attempted or made.

Enter.

E. B. L., *J. C. C.*

Notice of Entry.

SIR: Please take notice that the within is a true copy of an order, duly made and entered in the within entitled action, and filed in the office of the Clerk of the within named Court at his office, 32 Chambers Street, in the City of New York, Borough of Manhattan, the 25th day of October, 1915.

Dated, N. Y., Oct. 26, 1915.

Yours, etc.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Plaintiff.

Office and P. O. Address, 309 Broadway, Borough of Manhattan, New York City.

To Edward G. Delaney, Attorney for Defendant.

9 *Notice of Motion.*

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

Please take notice that upon the complaint herein, upon the affidavit of Abraham Rosenstein, one of the plaintiffs herein, hereto annexed, and upon the petition of the defendant herein, verified October 15th, 1915, the affidavit of Edward G. Delaney, verified the same day, the bond on removal, verified October 15th, 1915, and the notice dated October 15th, 1915, stating that said petition and bond for removal will be filed on October 16th, 1915, the undersigned will move this Court, at Special Term, Part I, thereof, to be held at the Courthouse thereof, No. 32 Chambers Street, in the Borough of Manhattan, City of New York, on the 20th day of October, 1915, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order setting aside the said bond and the alleged removal of the said case to the United States Court, and directing that this Court retain jurisdiction of this action and that said peti-

tion be rejected and that this Court adjudge that this action is not properly removable to the Federal Court, and for such other and further relief as may be just.

Dated, New York, October 16th, 1915.

Yours, etc.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Plaintiffs.

309 Broadway, Manhattan, New York City.

To Edward G. Delaney, Esq., Attorney for Defendant.

Affidavit of Abraham Rosenstein, Read in Support of Motion.

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Abraham Rosenstein, being duly sworn, deposes and says, that he is one of the plaintiffs in this action.

That this action was commenced in this Court to recover the sum of $800, $300 thereof being for loans made to the defendant and $500 under a special agreement of retainer entered into between plaintiff Feltenstein and defendant, all as set forth in the complaint, which will be submitted on this motion.

That the matters in controversy therefore involve but $800.

That on October 15th, 1915, and before the time to answer had expired, the defendant, by Edward G. Delaney, his attorney, served upon plaintiffs' attorney a notice that a petition and bond (of which copies were annexed), for removal of this action to the United States Court, would be filed with the Clerk of this Court on October 16th, 1915, and upon information and belief, that the said bond and the said petition have been filed.

As appears from the said bond and petition, as well as the affidavit of the attorney for defendant, the defendant has asked for the removal of this case to the United States Court on the ground that he, the defendant, was a citizen of the State of New Jersey and a non-resident of this State, and that therefore there is a diversity of citizenship.

No answer has been interposed, but the defendant merely alleges in his position that by way of his counterclaim, which defendant claims exceeds $3,000, and which defendant claims to be due and owing from plaintiff- herein, that the matter and amount is dispute in the above entitled action exceeds $3,000. A reading of the complaint, which was served on the defendant, shows that this is not a proper statement.

While defendant's attorney refers to the fact that the answer to

the complaint alleges and sets up an affirmative defense and a counterclaim exceeding $3,000, no answer has as yet been served in this action. Even were it served, it is not the answer that guides as to the amount in controversy or dispute, but the complaint herein is the pleading which guides the determination of that question.

The attempted removal is therefore inefficacious and invalid, and the attempted removal is wholly irregular and void.

Besides, even if the counterclaim had any bearing on the subject, the fact is that no answer has been served containing any counterclaim.

The attempted removal is also wholly irregular because no notice of motion has ever been given, which under the authorities is required to be given.

That summons and complaint herein *was* served on the defendant prior to October 15th, 1915, and this application is made both on said summons and complaint, the petition of the defendant aforesaid, the bond on removal and the affidavit of said Mr. Delaney, all of which will be submitted on this application.

Deponent therefore asks that the relief asked for in the annexed notice of motion be granted.

ABRAHAM ROSENSTEIN.

Sworn to before me this 16th day of October, 1915.

ROSE ADLER,
Notary Public, Bronx County.

Cert. filed in New York Co.

11 *Petition for Removal.*

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

To the Honorable Justices of the City Court of the City of New York, in the State of New York, held in and for the City of New York, in the County and State of New York:

Now comes your petitioner, the defendant in the above entitled action, and files his petition for the removal of this case from the above named Court, in which it is now pending, to the District *Circuit* of the United States, for the Southern District of New York.

And your petitioner respectfully shows to this Honorable Court that the above entitled cause of action is an action at law; which was commenced by the service of a summons and complaint upon the petitioner herein, on the 11th day of October, 1915, and that under the laws of the State of New York in such case made and provided, the time for your petitioner to answer, plead, demur or otherwise move will not expire until six days thereafter, to wit: the 17th day of October, 1915;

That the case at bar is a suit of a civil nature at common law of which the District Court of the United States for the Southern District of New York has original jurisdiction under the laws of the United States.

And your petitioner further respectfully shows to this Honorable Court, that by way of his counterclaim, which your petitioner claims exceeds the sum *of* value of Three thousand ($3,000) Dollars, exinterest and costs, and which your petitioner claims to be due and owing from the said plaintiffs in the above entitled suit, that the matter and amount in dispute in the above entitled cause of action exceeds the sum or value of Three thousand ($3,000) Dollars, exclusive of interest and costs.

That at the time of the commencement of this suit and since that time, the plaintiffs were and now are citizens and residents of the State of New York, County of New York, and within the jurisdiction of the District Court of the United States, for the Southern District of New York, and your petitioner, the defendant in the above entitled action, asking this removal was at the time of the commencement of this suit, and now is a non-resident of the State of New York, in which state the suit is brought, but was and now is a citizen and resident of the State of New Jersey, residing in the Borough of Alpine, in the County of Bergen and State of New Jersey.

No previous application has been made for the relief now requested.

And your petitioner offers herewith a good and sufficient surety under the statute in such case made and provided, conditioned as the law requires, that he will within thirty days from the
12 filing of the petition for removal, file a certified copy of the record of the case in*to* the District Court of the United States, for the Southern District of New York, for the payment of all costs which may be awarded by said District Court of the United States for the Southern District of New York, if said District Court shall determine and hold that this suit was wrongfully and improperly removed thereto.

And your petitioner therefore prays this Court that it proceed no further herein, except to order the removal, accept the bond or security herewith presented, and direct a transcript of the record to be made and certified, as provided by law.

BALTRUS S. YANKAUS,
Petitioner.

EDWARD G. DELANEY,
Attorney for Petitioner.

Office and P. O. Address, 154 Nassau Street, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
City of New York, County of New York, ss:

Baltrus S. Yankaus, being duly sworn, upon his oath, according to law, deposes and says:

I am the above named petitioner. I have read the foregoing pe-

tition and the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true.

BALTRUS S. YANKAUS.

Sworn to before me this 15th day of October, 1915.

[SEAL.] THOMAS J. CUFF,
Notary Public, Nassau Co.

Certificate filed in Kings Co. No. 14.
Kings Co. Register's No. 7128.

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

STATE OF NEW YORK,
City of New York, County of Kings, ss:

Edward G. Delaney, being duly sworn, says:

That he is attorney for the defendant above mentioned, retained to defend this action, and resides at No. 4917 Eleventh Avenue, Borough of Brooklyn, City of New York.

13 That said defendant has fully and fairly stated the facts of this case to deponent, and from such statement of the case in the action by defendant, deponent verily believes that the defendant has a good and substantial defense on the merits to the cause of action set forth in the complaint herein.

That the summons and complaint in this action were served on defendant on the 11th day of October, 1915, and that defendant's time to answer or demur thereto, will not expire until the 18th day of October, 1915. That such time has not been extended by stipulation or order, and no previous application has been made to any Court or Judge for this or any similar order.

That in his answer to the said complaint in this action, the said defendant alleges and sets up as an affirmative defense and as a counterclaim to plaintiffs' complaint, and alleged cause of action herein, a claim for damages exceeding the sum of Three thousand ($3,000) Dollars, exclusive of interest and costs, and that the matter and amount in dispute in said action exceeds the said sum of Three thousand ($3,000) Dollars, exclusive of interest and costs, and is within the jurisdiction of, and cognizable by the United States District Court, for the Southern District of New York, pursuant to the statute in such case made and provided.

E. G. DELANEY.

Sworn to before me this 15th day of October, 1915.

ONA RODER,
Commissioner of Deeds #76, *New York City.*

Commission expires Jan. 20, 1916.

Bond on Removal.

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

Know all men by these presents:

That we, Baltrus S. Yankaus, principal, and the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York at No. 2 Rector Street, in the Borough of Manhattan, in the City of New York, surety, are held and firmly bound unto Moses Feltenstein and Abraham Rosenstein in the sum of Five Hundred ($500) Dollars, lawful money of the United States, to be paid to the said Moses Feltenstein and Abraham Rosenstein, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the 15th day of October, 1915.

Upon condition, nevertheless that whereas, the said Baltrus S. Yankaus has filed a petition in the City Court of the City of New York for the removal of a certain cause therein pending between the said Moses Feltenstein and Abraham Rosenstein as
14 plaintiffs and the said Baltrus S. Yankaus as defendant, to the District Court of the United States, in and for the Southern District of New York;

Now, if the said Baltrus S. Yankaus shall enter in the said District Court of the United States within thirty days from the date of filing said petition, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and also for his appearing and entering special bail in said suit, if special bail was originally requisite therein, then this obligation to be void; otherwise to remain in full force and virtue.

BALTRUS S. YANKAUS. [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By JAMES R. KINGSLEY,
Attorney in Fact.

Attest:
[SEAL.]
ERNEST L. HICKS,
Attorney-in-Fact.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted:

"Resolved, That Henry B. Platt, Vice-President, James R. Kings-

"ley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn
"Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and Frank
"A. Eickhoff, all of the City of New York, State of New York, be
"and each of them is, hereby appointed Attorney-in-Fact of this
"Company and empowered to execute and deliver and attach the
"seal of the Company to any and all bonds or undertakings for or on
"behalf of this Company, in its business of guaranteeing the fidelity
"of persons holding places of public or private trust and the perform-
"ance of contracts other than insurance policies, and executing or
"guaranteeing bonds or undertakings required or permitted in all
"actions or proceedings, or by law required, permitted or allowed.

"Such bonds or undertakings to be executed for the Company by
"any one of the said Henry B. Platt, James R. Kingsley, Frank H.
"Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles
"V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and to be at-
"tested in every instance by one other of the said Attorneys-in-Fact,
"as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, Ernest L. Hicks, Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and
15 correct transcript therefrom, and of the whole of said original Resolution.

Given under my hand, and the seal of the Company, at the City of New York, this 15th day of October, 1915.

[SEAL.] ERNEST L. HICKS,
Attorney-in-Fact.

STATE AND COUNTY OF NEW YORK, *ss:*

On this 15th day of October, in the year 1915, before me personally came James R. Kingsley, to me known, who, being by me duly sworn, did depose and say, that he resided in the City of New York; that he was the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation named in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. And that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183 of the Insurance Law, constituting Chapter 28 of the Consolidated Laws of the State of New York. And the said James R. Kingsley further said that he was acquainted with Ernest L. Hicks and knew him to be the Attorney-in-fact of said Company; that the signature of the said Ernest L. Hicks subscribed to the said instrument, is in the genuine handwriting of the said Ernest L. Hicks and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said

[SEAL.] F. A. MASSEY,
Notary Public, New York County, No. 65.

COUNTY OF KINGS,
State of New York, ss:

On this 15th day of October, 1915, before me personally appeared the within-named Baltrus S. Yankaus, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

THOMAS J. CUFF,
Notary Public, Nassau Co.

Certificate filed in Kings Co. No. 14. Kings Co. Register's No. 7128.

(Allowance endorsed.)

16 *Notice.*

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

SIR: Please take notice that a petition and bond, of which the annexed is a copy, for removal of the above entitled action, to the United States District Court, for the Southern District of New York, will be filed by me in the office of the Clerk of the City Court of the City of New York, at his office, in the Borough of Manhattan, City of New York, on the 16th day of October, 1915.

Dated, New York, October 15, 1915.

Yours, etc.,

EDWARD G. DELANEY,
Attorney for Defendant,

Office and P. O. Address, 154 Nassau Street, Borough of Manhattan, City of New York.

To Virginius Victor Zipris, Esq., Attorney for Plaintiffs, 309 Broadway, Borough of Manhattan, City of New York.

Affidavit of Edward G. Delaney, Read in Opposition to Motion.

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Edward G. Delaney, being duly sworn, says:

That he is attorney for the defendant in the above entitled action.

That said action is one at law of which the United States District Court for the Southern District of New York has original jurisdiction. That the action was commenced by service of the summons and complaint therein on said defendant, on the 11th day of October, 1915.

That on the 16th day of October, 1915, and before defendant's time to answer, plead or otherwise move in said action had expired, said defendant duly filed petition and affidavit for removal of said cause to the District Court of the United States, for the Southern District of New York, and duly presented his bond in the sum of Five hundred ($500) Dollars for that purpose as provided by law, and under the Statutes of the United States in such case made and provided.

17 That on said 16th day of October, 1915, the said bond on behalf of defendant was duly approved by one of the Justices of this Court, and thereupon the said petition, affidavit and bond was duly filed in the office of the Clerk of this Court and now is on file therein according to law and the rules and practice governing in such cases.

That a copy of said petition, affidavit and bond, approved as aforesaid, was duly served upon the attorney for the plaintiffs in this action, and due notice was given said attorney that said petition and bond would be filed in the office of the Clerk of this Court on the 16th day of October, 1915; that such service of said petition and bond and notice aforesaid, was thereupon duly admitted by said plaintiff's attorney, and endorsed upon the original thereof, as more fully appears from said endorsement on said original papers now on file in this Court.

That the statutes of the United States (U. S. Comp. Stat., 1913; sec. 1010; Judicial Code, Sec. 28) provides as follows:

"Any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought in any State Court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. * * * And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district. * * *

Whenever any cause shall be removed from any State Court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed. * * *

U. S. Comp. Stat., Sec. 1011 (Judicial Code, Sec. 29) provides:

"Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court
18 to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit.

Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

That the said petition of defendant, made and filed herein, contains a statement of all the necessary jurisdictional facts, including the diversity of citizenship of plaintiffs and of the defendant, and also that the amount involved is over Three thousand Dollars, the amount of said United States District Court's jurisdiction in civil actions as determined by defendant's counterclaim and affirmative defense in the answer to be interposed to said complaint.

That a correct copy of the record in said suit or action, heretofore pending in this Court, was duly certified by the Clerk of the City Court of the City of New York, as provided by law, and that said certified copy of such record has been duly filed, on behalf of the defendant, in the office of the Clerk of the District Court of the United States, for the Southern District of New York, as provided by the statutes aforesaid, and the law in such case made and provided, and that said suit or action is now properly pending in said District Court, for the Southern District of New York, to be therein further prosecuted and disposed of according to law, and the statutes of the United States aforesaid.

That all of said steps and proceedings for removal in this suit, taken by the defendant as aforesaid, are in accordance with universal practice in such cases, and as provided by law and sanctioned by authority (Clarkson vs. Mason, 18 Blach., 443, Aurora vs. West, 6

Wall., 139). That the facts in the Clarkson case were, briefly, as follows:

Plaintiff brought suit in the New York Marine Court (the present City Court) against the defendant to recover $195, an alleged balance unpaid on a sale of fixtures, etc.

The answer alleged false representations, etc., on the part of plaintiffs, upon which defendants had relied and had incurred thereby great expense, etc., and claiming as damages by reason thereof, the sum of $750, which defendant set up as a counterclaim in the action.

19 A reply was put in to this by the plaintiff.

Afterwards, the defendant presented a petition to the State Court for removal, setting up the pendency of the action, and that the plaintiffs were citizens of New York, and the defendant of New Jersey; and stating in their petition "that the matter in dispute in this action, exclusive of costs, is the sum or value of $500; that the action had not yet been tried, and that no term had passed since it was commenced at which it could be tried.

A proper bond was given by defendant and approved, and an order obtained ex parte removing, etc.

Afterwards, before the record in the State Court was filed in the United States Court, the State Court made an order vacating the order of removal. Defendant, however, claiming that the suit was in fact removed, filed in the United States Court, certified copy of the proceedings, and of the order of removal, and entered an ex parte order, reciting the filing of th record and ordering that the cause proceed no further in said Court, etc.

order, reciting the filing of the record and ordering that the cause proceed no further in said Court, etc.

Plaintiffs moved to vacate this last order and to remand action to State Court.

The motion of the plaintiffs to remand was denied, the Court in its opinion said:

"A counterclaim is held to be an affirmation of a cause of action against the plaintiff in the nature of a cross action and upon which the defendant may have an affirmative judgment against the plaintiff. As a cross action, setting forth a cause of action by the defendant against the plaintiffs, and demanding a judgment for $750 in addition to the dismissal of the plaintiff's complaint and the defeat of the plaintiff's claim—the claim in which cross action is disputed by the plaintiffs by the reply—the counterclaim clearly brings into the suit a matter in dispute which exceeds $500 in value."

That defendant's right of removal from the State Court to the United States Courts is statutory. A petition for removal must show jurisdiction in the Federal Court; if it does not and the omission is not afterwards supplied, the suit must be remanded (Little York Gold Washing and Water Co. vs. Keyes, 96 U. S., 199).

That as deponent respectfully submits, neither will the Court inquire, on a motion to remand the case to the State Court, either as to the truth of the allegations in the pleadings, or the sufficiency of the complaint or bill as such, or the answer or counterclaim, or whether

the same states a good cause of action. These matters are for the decision of the Court which finally tries the action (Hax, and others vs. Caspar, and others, 31 Fed. Rep., 499). In that case Brewer, J., in the opinion says:

"What may be the truth cannot of course be determined upon a motion to remand * * * whether it does or does not state a cause of action is not a question to be considered on a motion to remand."

That the petition and affidavit submitted and filed herein upon removal by the defendant, sets forth all the facts which are required and necessary to give the United States Court jurisdiction, and are in strict compliance with the U. S. statutes providing for removal in such cases. That no order of the State Court is necessary upon a removal in such cases (Home Life Insurance Co. vs. Dunn, 19 Wall., 214; 86 U. S., 68; Kern vs. Huidekoper, 103 U. S. 354).

The practice and proceedings followed and taken by the defendant upon the removal of the suit herein to the United States District Court as aforesaid, are in strict compliance with the provisions of Sections 28 and 29 of the Federal Judicial Code, above set forth, and are sustained by recognized authority. In Goldey vs. Morning News (156 U. S., 518), it was held:

"The legislature or the judiciary of a State can neither defeat the right given by a Constitutional Act of Congress to remove a case from a Court of a State into the Circuit Court of the United States, nor limit the effect of such removal."

Again in Donovan vs. Wells Fargo & Company (168 Fed. Rep., 363), it was held that:

"If plaintiff desires to controvert the truth of certain facts averred in the petition, he must make an issue with respect to them in the Federal Court, and that issue must be tried in that Court. If the State Court refuses to make the order of removal on the showing made by the face of the record, the defendant may within the prescribed time enter a copy of the record as it stood on the filing of the petition and the bond with it."

That the affidavit of Abraham Rosenstein, verified October 16, 1915, and the moving papers herein, do not challenge or deny the facts set out in the petition for removal of this action, and in the affidavit annexed thereto, and that, therefore, all the statements and averments in said petition and affidavit must be taken as true.

That for the reasons aforesaid, the present motion of the plaintiffs in this Court should be denied with costs.

E. G. DELANEY.

Sworn to before me this 20th day of October, 1915.

LOUIS ROSENZWEIG,
Comm. of Deeds, City of New York.

Decision and Opinion (La Fetra, J.)

Feltenstein vs. Yankaus. Motion granted. Even should th notice of the filing of the petition and bond be deemed sufficie within Section 29 of the Federal Judicial Code, the facts set fort in the petition fail to show the amount in dispute exceeds $3,000. I determining the question of amount in dispute the sum claimed i the action is to be considered, and not the amount of the propose counterclaim (McKown vs. Kansas & T. Coal Co., 105 Fed., 657 Crane Co. vs. Guanica Centrale, 132 Fed., 713). Settle order on or day's notice.

21–23 *Clerk's Certificate.*

This is to certify, pursuant to Section 1353 of the Code of Civ Procedure, that the foregoing are true copies of the notice of appea of the judgment roll filed herein on the 26th day of October, 191 of the order of October 25th, 1915, and of the papers used before th justice upon the hearing of the motion herein and specified in th said order, and of the whole of such originals now on file in m office.

Dated, N. Y., November 20th, 1915.

THOMAS F. SMITH,
Clerk of the City Court of the City of New York.

19111

[Seal City Court of the City of New York.]

[United States internal revenue documentary stamp, series o 1914, ten cents, canceled 3:10, '16. City of New York.]

24 Supreme Court. Appellate Term. First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs Respondent-,
against
BALTRUS S. YANKAUS, Defenadant-Appellant.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Baltrus S. Yankaus, being duly sworn, deposes and says:

That I am the defendant in the above entitled action and the appellant upon the appeal herein to this Court.

That said action was brought in the City Court of the City of New York, and that on or about the 11th day of October, 1915, the summons and complaint in said action were served upon me.

That on October 16, 1915, and before the time to answer or plead in said City Court had expired, a petition and proper bond on re-

moval was filed in said City Court, upon removal of said action from said City Court to the United States District Court, Southern District of New York, pursuant to the statutes of the United States, and to the United States Comp. Stat., Secs. 1010 and 1011 (Jud. Code, Secs. 28 and 29), which reads as follows:

[On margin:] O. K. J. A. McC.

"Any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought in any State Court, may be removed by the defendant or de-
25 fendants therein to the District Court of the United States for the proper District. * * * And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district. * * *"

"Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such State Court, at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit.

Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

That on October 15, 1915, notice was given the plaintiffs herein and their attorney, that the petition and bond for removal aforesaid, would be filed in said City Court on the 16th day of October, 1915, pursuant to law and the statutes aforesaid.

That on October 20, 1915, a transcript of the record on removal in said action was duly filed in the District Court of the United States, Southern District of New York, pursuant to law and
26 the statutes aforesaid.

That the grounds urged for the removal of said action from the said City Court of the City of New York, to the said District Court of the United States, for the Southern District of New York, were as follows:

That the action above mentioned was an action at law, and one of which the said United States District Court had original jurisdiction; that the amount in controversy in said action, exceeded the sum or value of Three Thousand ($3000) Dollars, by reason of a counterclaim of the defendant in that action, which exceeded the sum of Three Thousand ($3000) Dollars, exclusive of interest and costs, and over and above the amount of said plaintiffs' claim in said action, and by reason of the fact that at the time of the commencement of said action, the plaintiffs were, as they now are, citizens and residents of the State of New York and County of New York, and within the jurisdiction of the District Court of the United States, for the Southern District of New York, and that the defendant in that action, this deponent, at the time of the commencement thereof, was a citizen and resident of the State of New Jersey, as more fully set forth in said petition on removal, filed in said City Court as aforesaid.

That under the statutes and laws of the United States, in accordance with the decisions and practice in such cases; the said action was no longer in the said City Court of the City of New York, from the date of the filing of said petition and bond, to-wit: October 16, 1915, and until the 16th day of November, 1915, when the order to remand said action to said City Court of the City of New York was made by Hon. Charles M. Hough, District Judge, and filed on that day in the office of the Clerk of the said District Court of the United States, for said Southern District of New York.

[On margin:] O. K. J. A. McC.

That pursuant to the United States Comp. Stat. aforesaid, the time of said defendant to plead, answer or demur to the complaint in that action, did not expire until thirty (30) days after the
27 filing of the record of removal in said United States District Court, for the Southern District of New York, to-wit: the 20th day of November, 1915.

That the answer of said defendant in the said action in the said United States District Court, Southern District of New York, was duly filed therein on or about the 8th day of November, 1915.

That notwithstanding the time of said defendant to answer or otherwise plead in said action, removed to the United States District Court, Southern District of New York as aforesaid, had not expired, and before the filing of said defendant's answer on said 8th day of November, 1915, the said plaintiffs procured and entered in said City Court, on or about the 26th day of October, 1915, an alleged agreement against the defendant for the sum of Eight Hun-

dred Eighty-two and 78/100 ($882.78) Dollars, and proceeded to enforce said judgment by execution and attached the property of the defendant in The Equitable Trust Company, amounting to the sum of about Fifty-one Hundred ($5100) Dollars, on deposit to the credit of the defendant, this deponent. That said judgment was obtained in said City Court after the said action had been removed therefrom to the United States District Court, Southern District of New York, as aforesaid, and was therefore void, and not within the jurisdiction of said City Court, and was in violation of the rights of said defendant, under the Constitution of the United States, and of the fourteenth amendment of Article XIV, Sec. 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[On margin:] O. K. J. A. McC.

That upon the motion made by me in the District Court of the United States, for the Southern District of New York, en-
28 joining said plaintiffs from further proceedings against me in any alleged action in the said City Court, and which motion came on to be heard before Hon. E. H. Lacombe, Circuit Judge, on or about the 29th day of October, 1915, the Court in deciding said motion, in its opinion, to which I beg leave to refer on this motion, distinctly held and decided that the said action was then in the said District Court of the United States, Southern District of New York, and enjoined the plaintiffs from further proceeding in the State Court, until a proper motion to remand had been made in the said United States District Court, Southern District of New York.

Between the time of the filing of said petition and bond on removal, and the entry of the judgment appealed from, to wit: on or about the 20th day of October, 1915, a motion was brought on to be heard in the said City Court for an order setting aside the said bond and the removal of the action to the United States District Court, and directing that the City Court retain jurisdiction of the action, and that the said petition be rejected, and that the City Court adjudge the action not properly removable to the United States District Court.

This motion was heard by Mr. Justice La Fetra who decided that the City Court should retain jurisdiction of the action, and attempted to set aside the removal and declare that the action was not properly removable. Upon rendering this decision, Mr. Justice La Fetra signed the order which is appealed from this Court. This appeal the plaintiffs-respondent- now seek to have dismissed, alleging that the question is purely academic.

The judgment appealed from reads as follows:

[On margin:] O. K. J. A. McC.

"Judgment. New York, October 26, 1915. The summons and complaint in this action having been personally served on Baltrus S Yankaus, the defendant, on the 11th day of October, 1915, and the time for said defendant to appear, answer or demur herein having fully expired, and said defendant not having appearing or answered or demurred herein, except that defendant, by attorney filed an undertaking and petition on removal to the United
29 States District — and also gave notice thereof to plaintiffs, and on motion of plaintiff, said removal or attempted removal has been set aside and this Court retained judisdiction by an order made this day.

Now, on motion of Virginius Victor Zipris, Plaintiffs' attorney it is hereby adjudged that Moses Feltenstein and Abraham Rosenstein, the plaintiffs, recover of Baltrus S. Yankaus, etc."

The facts set forth in this affidavit and the moving affidavit show clearly, first, that the judgment appealed from, although by its recitation, a judgment taken on default was not actually a judgment taken by default, but was one entered by the plaintiff against the defendant, while the action was not in the City Court but was in the United States Court, and before the defendant's time to answer, demur or otherwise plead to the complaint, under the rules operative in the said United States District Court had expired. It was moreover entered upon the authority of the order appealed from, by means of which the Court attempted to retain jurisdiction of the action.

The appeal from the order goes to the root of the question of the Court's authority to proceed in the action, notwithstanding removal according to the United States Statutes to the United States District Court.

The United States Statute above quoted, says:

"It shall then (upon the filing of the petition and bond for removal) be the duty of the State Court to accept said petition and bond and *rp*oceed no further in such suit."

The appeal from the order is therefore not academic. The judgment in a measure, rests upon the order of Mr. Justice La Fetra. The appellant above named asks this Court to review the authority of the Court to make such an order as was made by Mr. Justice La Fetra, and to render such a judgment as was rendered.

In view of the fact that the action had been removed to the

[On margin:] O. K. J. A. McC.

United States District Court, and that by law, the time to answer had not expired, and in view also of the fact that under the
30 United States Statutes, it was the duty of the State Court to proceed no further in the action, until by the authority of the United States Court, the action should be remanded to the State Court.

The appellant seeks to have this Court review the question of the City Court's right to attempt to retain jurisdiction in the face of the United States Statute, and the duly filed petition and bond for removal, as well as the judgment entered after such attempt to

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retain jurisdiction, and deponent respectfully submits that the right of appeal from such judgment does exist, and the question raised on appeal from the order is not by any means academic.

If the judgment and order are allowed to stand, the appellant will be deprived of his property without due process of law, and in defiance of the United States Statutes, and the Constitution of the United States.

Deponent also contends that the respondent herein, in making a motion to dismiss the appeal, has mistaken his remedy. If the judgment and order appealed from are not in fact appealable, the Appellate Court can only dismiss the appeals when they come on to be heard. Whether they are actually appealable cannot be determined upon affidavits on a motion to dismiss the appeal, but only upon the record on appeal. Appeals may be dismissed upon motion only for failure to prosecute the appeal with diligence, or to perform some necessary act in connection with perfecting the right to appeal. The question presented upon this motion is a question affecting the merits of the appeal and for this reason alone, the motion should be denied with costs.

B. S. YANKAUS.

Sworn to before me this 23 day of November, 1915.

[Seal City Court of the City of New York.]

ONA RODER,
Comm. of Deeds, #76, New York City.

Comm. expires Jan. 20, 1916.

Copy.
THOMAS F. SMITH, *Clerk.*

[On margin:] O. K. J. A. McC.

[Cancelled revenue stamp.]

31 [Endorsed:] Supreme Court, Appellate Term, First Department. Moses Feltenstein and Abraham Rosenstein, Plaintiffs-respondent-, against Baltrus S. Yankaus, Defendant-appellant. Affidavit in Opposition to Motion to Dismiss Appeal. Edward G. Delaney, Att'y for defendant-appellant, 154 Nassau Street, Borough of Manhattan, City of New York.

OSE IN CENTER

32 At a Term of the Supreme Court Held for the Hearing of Appeals from the City and Municipal Courts of the First Judicial Department at the County Court-house in the City of New York, Borough of Manhattan, on the 24th Day of November, 1915.

Present:

Hon. Irving Lehman,
" Nathan Bijur,
" Edward R. Finch,
Justices.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Order upon Motion.

The above named plaintiff having by notice of motion dated the 18th day of November, 1915, moved for an order herein dismissing an appeal taken by the defendant from judgment and an order of the City Court in the above entitled action.

Now upon reading and filing the affidavit of Abraham Rosenstein, verified the 18th day of November, 1915, in favor of said motion, and the affidavit of Baltrus S. Yankaus verified the 23rd day of November, 1915, in opposition thereto,

It is ordered that said motion be and the same hereby is denied. Enter.

[Seal City Court of the City of New York.]

E. R. F.,
Justice Supreme Court, Sitting in Appellate Term.

A Copy.
T. F. SMITH, *Clerk.*

[On margin:] O. K. J. A. McC.

[Cancelled revenue stamp.]

33 [Endorsed:] Supreme Court, New York County. Moses Feltenstein and Abraham Rosenstein, Plaintiffs, against Baltrus S. Yankaus, Defendant. Order. Virginius Victor Zipris Attorney for plaintiffs, 309 Broadway, Borough of Manhattan, City of New York.

34 At a Term of the Supreme Court, Held for the Hearing of Appeals from the City and Municipal Courts of the First Judicial Department, at the County Court-house, in the City of New York, on the 13th Day of December, 1915.

Present:

Hon. Charles L. Guy,
" Alfred R. Page,
" Eugene A. Philbin,
Justice-.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Order Appealed from City Court.

The above named defendant having appealed to the Supreme Court, from an order of the City Court, entered in the office of the Clerk of said Court, on the 25th day of October, 1915, and from the judgment of said Court, entered on the 26th day of October, 1915, and the said appeal having been heard, and due deliberation had thereon.

It is hereby ordered that the order so appealed from be and the same is hereby affirmed with $10 costs and disbursements and appeal from judgment dismissed with $10 costs.

Enter.

[Seal City Court of the City of New York.]

C. L. G.,
Justice, Supreme Court,
Sitting in Appellate Term.

[On margin:] O. K. J. A. McC.

A copy.
T. F. SMITH, *Clerk.*

[U. S. revenue stamps cancelled.]

35 SIR: Please take notice that the within is a true copy of an order duly made and entered in the within entitled action, and filed in the office of the Clerk of the within named Court at his office County Court House, in the City of New York, Borough of Manhattan, the 13 day of Dec., 1915.

Dated, N. Y., Dec. 14, 1915.

Yours, etc.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Pl'ff.

Office and Post office address, 309 Broadway, Borough of Manhattan, New York City.

To Edward G. Delaney, Esq., Attorney for def't.

[Endorsed:] Supreme Court, New York County. Moses Feltenstein, ano., Plaintiff-, against Baltrus S. Yankaus, Defendant. Order and notice of entry. Virginus Victor Zipris, Attorney for pl'ff, 309 Broadway, Borough of Manhattan, New York City. To Edward G. Delaney, Esq.

36 At a Special Term, Part 2, of the City Court of the City of New York, held in and for the City of New York, at the Court House, No. 32 Chambers Street, in the Borough of Manhattan, City of New York, This 16 Day of December, 1915.

Present: Hon. Peter Schmuck, Justice.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

[On margin:] O. K. J. A. McC.

The above named defendant having appealed to the Appellate Term of the Supreme Court of the State of New York, in and for the First Department, from the judgment filed and entered in the office of the Clerk of the City Court of the City of New York on October 26th, 1915, in favor of plaintiffs and against the defendant, for the sum of $882.78, and also from an order made and filed herein on October 26, 1915, by Hon. Edward B. LaFetra, one of the Justices of this Court, setting aside the removal of this action to the District Court of the United States, for the Southern District of New York, and declaring that said action was not removable to the said District Court and that this Court continue to retain jurisdiction of this action as though such removal had not been made, and the said appeal having been duly argued at the December 1915 Term of the said Appellate Term and after due deliberation having been had thereon, said Appellate Term having ordered and adjudged that said order be affirmed with Ten Dollars costs and disbursements to respondents, and that the said appeal from the
37 said judgment be dismissed with Ten Dollars costs to respondents and that the record and proceedings be remitted to this Court and this Court directed to enforce the said order and judgment of the said Appellate Term according to law.

Now Therefore, on motion of Virginius Victor Zipris, attorney for plaintiffs respondents, it is

Ordered and Adjudged that the judgment of the Appellate Term be and it is hereby made the judgment of this Court, and that plaintiffs have judgment against the defendant for the sum of twenty ($20) dollars, costs to the plaintiffs, and disbursements, to be adjusted by the Clerk of this Court, as well as the amount adjudged to be recovered in and by the judgment of this Court entered on October 26, 1915.

Enter,

[Seal City Court of the City of New York.]

P. S., *J. C. C.*

A copy.

THOMAS F. SMITH, *Clerk.*

[U. S. revenue stamp, cancelled.]

COPY BOUND CL

38 *Notice of Entry.*

SIR: Please take notice that the within is a true copy of an order duly made and entered in the within entitled action, and filed in the office of the Clerk of the within named Court at his office 32 Chambers St. in the City of New York, Borough of Manhattan, the 17 day of Dec., 1915.

Dated, N. Y., Dec. 17, 1915.

Yours, etc.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Pl'ff.

Office and Post office Address 309 Broadway, Borough of Manhattan, New York City.

To Edward G. Delaney, Esq., Attorney for Def't.

[Endorsed:] County Clerk's Index No. 11909, year 1915. City Court of the City of New York. Moses Feltenstein and ano., Plaintiff-, against Baltrus S. Yankaus, Defendant. Order and notice of entry. Virginius Victor Zipris, Attorney for Pl'ff, 309 Broadway, Borough of Manhattan, New York City. To Edward G. Delaney, Esq., Attorney for ——. Rec'd Dec. 18, 1915.

39 Supreme Court, Appellate Term, First Department.

Arg-ed and Decided December, 1915, Term; Cal. No. 10, Motions.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Order to Show Cause.

Upon the annexed affidavit of Edward G. Delaney, verified the 28th day of December, 1915; upon the printed record and papers on appeal from the judgment, entered in the City Court of the City of New York, on the 26th day of October, 1915, for the sum of $882.78, in favor of above named plaintiffs and against the defendant, and from the order of Mr. Justice La Fetra, one of the Justices of the said City Court, dated October 25, 1915, vacating and setting aside the removal of this action from said City Court to the United States District Court, for the Southern District of New York; upon the determination of the Appellate Term, First Department, affirming said order appealed from and dismissing said appeal, made at the present December Term of this Court; and upon all the other papers and proceedings herein, let the plaintiffs or their attorney show cause at an Appellate Term of the Supreme Court, First Department, to be held at the County Court House, in the Borough of Manhattan,

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City of New York on the 30th day of December 1915, at 10:00 o'clock A. M. of that day or as soon thereafter as counsel can be heard, why an order granting leave to the appellant to appeal from the said determination of said Appellate Term to the Appellate Division of the Supreme Court, First Department, should not be made and allowed herein, pursuant to Section 1344, of the
40 Code of Civil Procedure and the rules and practice of this Court; and why defendant should not have such other and further relief in the premises as may be just and proper.

[On margin:] O. K. J. A. McC.

And sufficient reasons appearing therefor, and until the hearing and decision of this motion, and the entry of an order thereon, it is

Ordered that all proceedings on the part of the plaintiff, their attorney, the Sheriff of the County of New York, and all other persons, with respect to the enforcement or collection of said above mentioned judgment and the judgment for costs on appeal herein, be and they are hereby stayed

Service of copy of this order, on said plaintiffs or their attorney, on or before the 28th day of December, 1915, shall be deemed good and sufficient service thereof.

Dated New York, December 28th, 1915.

CHARLES L. GUY,
Justice of the Supreme Court, Sitting in the Appellate Term.

[On margin:] O. K. J. A. McC.

41 Supreme Court, Appellate Term, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Affidavit of Edward G. Delaney.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Edward G. Delaney, being duly sworn, deposes and says:

I am the attorney for defendant in this action.

On or about November 5, 1915, an appeal was duly taken by defendant to this Court, from a judgment entered on October 26, 1915, in the City Court of the City of New York, in favor of plaintiffs and against said defendant, for the sum of $882.78, and from an order of Mr. Justice La Fetra, of said City Court, dated October 25, 1915.

[On margin:] O. K. J. A. McC.

The appeal from said judgment was taken upon the ground that such judgment was void and was rendered at a time wherein said action was not longer in the City Court, but had been removed to and was at such time actually pending in the United States District Court, for the Southern District of New York, by virtue of the laws and statutes of the United States, (U. S. Comp. Stat., Secs. 1010 and 1011; Jud. Code, Secs. 28 and 29) governing such cases, and that the same was in violation of the defendant's rights under the Constitution and Laws of the United States, and a taking of property without due process of law, and that said United States District Court, was at such times alone vested with jurisdiction in said
42 action, and that the City Court was, by the removal of said action, under the statutes aforesaid, without jurisdiction or authority to make or render any judgment in that action.

That the appeal from said order of Mr. Justice La Fetra, dated October 25, 1915, was upon the ground that said order, for the reasons aforesaid, was void and without jurisdiction.

That this deponent begs leave to refer upon this motion, and make a part thereof, the printed papers on appeal from said judgment and order, and appellant's brief therein, for a more particular statement of the facts and of the law and authorities relied upon by the appellant upon this appeal.

That the following is a very brief summary of the facts in this case, and as set forth in the printed papers on appeal herein, to wit:

The action was originally commenced in the said City Court, and the summons and complaint therein were served on said defendant, on the 11th day of October, 1915.

Before the expiration of the six days' time allowed in which to plead in said action in the City Court, and before answering therein, defendant caused a petition and Surety Company bond, duly approved, to be filed on October 16, 1915, in said City Court, for the removal of the action from that Court into the United States District Court, for the Southern District of New York, pursuant to the U. S. Comp. Stat. 1010 and 1011; Jud. Code, Sec. 28 and 29, above referred to.

That on October 13, 1915, a copy of said petition and bond, with written notice of intention to file the same on October 16, 1915, was given to the plaintiffs, as required by the statutes aforesaid.

[On margin:] O. K. J. A. McC.

On October 20, 1915, a certified copy of the record on removal of said action was duly filed in the United States District Court, Southern District of New York, and defendant in the action
43 was allowed thirty days from that date within which to answer, plead or demur to the complaint therein, as more fully provided for by the statutes aforesaid.

On or about November 8, 1915, while the action was still in the United States District Court, and before the expiration of thirty days above mentioned, defendant caused to be filed his answer to the complaint in said action in the United States District Court,

for the Southern District of New York, to which said answer d ponent begs leave to refer on this motion.

After the removal of said action from said City Court to th United States District Court, for the Southern District of Ne York, pursuant to the provisions of the statutes above mentione the plaintiffs, upon a motion made by them in the City Court f that purpose, obtained from Mr. Justice La Fetra of said Ci Court, an order, dated October 25, 1915, purporting to vacate an set aside the removal of said action to the United States Distri Court, in the manner and under the authority of the United Stat statutes aforesaid, and declaring in said order that the City Cou continued to retain jurisdiction over the action.

On October 26, 1915, immediately following the entry of sai order, and without notice of any kind to the defendant, the plaintif entered a judgment in said City Court of the City of New Yor in favor of said plaintiffs and against said defendant, for the su of $882.78.

[On margin:] O. K. J. A. McC.

Thereupon, and on or about October 27, 1915, plaintiffs issue execution upon said judgment against the property of said defen ant, and seized and attached his bank account with the Equitab Trust Company, amounting to over $5,000, and by third party orde in supplementary proceedings, tied up said moneys of defendan so that he was and has still been unable to use and dispose of th same, and that thereafter, said plaintiffs obtained an order from on of the Justices of the City Court, that said defendant deliver an turn over to the Sheriff of the County of New York, sufficie
44 of such moneys to satisfy the said judgment of October 2 1915, with interest, costs and Sheriff's fees, and the costs supplementary proceedings allowed by the order aforesaid.

After the entry of said judgment, on said 26th day of Octobe 1915, and the issuance of execution thereunder, and after the pr ceedings taken by plaintiffs to enforce said judgment, defendan made a motion, on October 29, 1915, in the United States Distri Court, for the Southern District of New York, to which said actio had been removed, and wherein it was then pending, to restrai and enjoin said plaintiffs from further proceeding in the City Cou to enforce payment and collection of said judgment, while the actio was in the United States District Court as aforesaid.

That Circuit Judge Lacombe, before whom the motion was hear granted said motion of defendant, and on November 4, 1915, a order was made and signed by said Judge, a copy of which i hereto annexed and marked "A," enjoining the plaintiffs fro further proceeding in said City Court, or attempting to collect sai judgment, as more particularly appears from said order attache and marked "A," as aforesaid.

That after the decision of Circuit Judge Lacombe, upon the m tion aforesaid, wherein in a memorandum of decision made by hi he held and decided that the said case was then in the Unite States District Court, and not in the City Court, and would so r

main until it was removed by proper motion made in the United States District Court, plaintiffs moved upon notice in said U. S. District Court, for an order to remand said action to the City Court, and that after such motion had been heard and decided by Judge Hough, before whom it was argued, an order of said Judge Hough was thereupon entered by the plaintiffs dated November 16, 1915, and a copy of such order was served on the defendant, remanding said action back to the City Court of the City of New York from which Court it had originally been removed under and pursuant to the statutes above mentioned.

[On margin:] O. K. J. A. McC.

45 That in the decision of Judge Hough, upon that motion, either through inadvertance or oversight, the said Judge failed to take notice of the fact that about a week before, to wit: on November 8, 1915, the defendant had filed his answer to the complaint in the action in the United States District Court.

That the defendant duly and seasonably appealed to this Court from the said judgment of October 26, 1915, entered by the plaintiffs against this defendant, upon the ground that the same was a void judgment, and upon the other grounds heretofore set forth and referred to in defendant's brief upon the appeal, and also from the order of Mr. Justice La Fetra, of said City Court, dated October 25, 1915.

Said appeal duly came on for argument at the present December 1915 term of this Court, and was argued and submitted on December 6, 1915, being No. 10 on the Motion calendar for that day.

That this Court has decided at this Term said appeal in favor of said plaintiffs and respondents and against defendant the appellant therein, and has affirmed said order appealed from with costs, and dismissed the appeal from said judgment with costs, and that a copy of said order of this Court was served on deponent on December 14th, 1915, together with a bill of plaintiff's costs on appeal, with notice of taxation, and that judgment has since been entered therefor.

[On margin:] O. K. J. A. McC.

That the present motion for leave to appeal to the Appellate Division is asked for herein for the reason that important questions of law are herein involved, and important public statutes, including the statutes of the United States, (U. S. Comp. Stat., Secs. 1010 and 1011; Jud. Code, Secs. 28 and 29). as well as defendant's rights under the U. S. Constitution, 14th Amendment, Sec. 1; and that the principles herein involved are of importance to others than the parties in litigation in this action, and that the determination

46 of the several issues and questions involved in this case will affect great interests, and will necessarily settle important principles of law affecting numerous cases.

That in determining this appeal, no opinion was filed by the Appellate Term, and that appellant is therefore without definite knowledge of the particular principle or points of law in said appeal

which were decided or passed upon by said Appellate Term, or whether any important authority or principle of law applicable, or submitted in support of appellant's contention on said appeal, had been overlooked or had not been properly brought to the attention of the Court, and that for that reason also, it is most respectfully urged that the present motion be granted.

That in addition to the authorities and cases cited on appellant's brief upon the argument of this appeal, and to which deponent would beg leave to refer and use on this motion, and some of which are herein referred to, deponent begs to submit on the present motion some additional authorities not heretofore cited by him on said appeal before this Honorable Court.

That following are some of the principal cases cited on appellant's brief, which deponent begs leave to submit on this motion, in addition to the Constitution and statutes of the United States before mentioned.

U. S. Constitution, 14th Amendment, Sec. 1.
U. S. Comp. Stat. Sec-. 1010 and 1011; Federal Judicial Code, Secs. 28 and 29.
Kern vs. Huidekoper, 103 U. S. 492.
R. R. vs. Koontz, 104 U. S. 14.
Texas & R. Co. vs. Eastin, 214 U. S. 153.
Donovan vs. Wells, Fargo Co., 169 Fed. R. 362.
Loop vs. Winter's Estate, 115 Fed. R. 362, 365.
Flint vs. Coffin, et al., 176 Fed. R. 872.
Noble vs. Mass. Ben. ass'n, 48 Fed. R. 337.

[On margin:] O. K. J. A. McC.

47 In the case of Buckston vs. Pa. Lumber Co., 221 Fed. R. p. 725, which was not cited on appellant's brief, holding that the U. S. Court alone had jurisdiction after the removal of the action from the State Court, we find the following language used in the opinion:

"It is unthinkable that Congress would provide such an elaborate procedure if it could be of no avail without the consent of the State Court, or until the Supreme Court of the United States had so directed. The right of removal is one conferred by the Federal statute. It is therefore a Federal question. An order to remove by the State Court is unnecessary. My attention has been called to no authority holding the contrary. The right of removal is in nowise dependent on the judgment of the State Court. Donovan vs. Wells Fargo & Co., 169 Fed. 363; 94 C. C. A. 609; 22 L. R. A. (N. S. 1251).

The right under the statutes depends on the existence of certain facts. The petition setting up these facts must be accepted as true by the State Court. If the truth of such allegations of fact is controverted, the issue can be decided by the Federal Court only."

Also the case of Clarkson vs. Manson, 4 Fed. R. 258, holding that the defendant who pleads a counterclaim of an amount in excess of the jurisdictional amount in controversy, may remove the action.

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This case has been followed in a number of later authorities, and has not yet been directly overruled.

See also Block vs. Darling, 140 U. S. 234.

That the cases cited on appellant's brief on the appeal just decided herein, are either not directely in point or are clearly distinguishable from the case at bar, and the cases, namely viz: McKown vs. Kansas & T. Coal Co., 105 Fed. 657.

There the question arose on a motion in the Federal Court to remand the action to the State Court, the opinion of the District Judge (Rogers) declares that the cases are conflicting and that because the proposition is too doubtful he concluded to remand the action. That is all that was actually decided. Everything else the Judge said, in his opinion, was obiter dicta.

[On margin:] O. K. J. A. McC.

48 Moreover, in that case it appears that the defendant had submitted itself to the jurisdiction of the State Court by filing an answer and counterclaim therein, simultaneously with the filing of petition for removal.

There is no authoritative finding that the State Court had continued to retain jurisdiction while the case was actually in the U. S. Court, and before its remand to the State Court, and Judge Rogers, in his opinion, admits that where the defendant is compelled to plead a counterclaim a contrary rule as to removal, as determined by the counterclaim, may be essential to the ends of justice.

In the case at bar, it can readily be seen that on account of the limited jurisdiction of the City Court, the defendant could not plead his counterclaim to the complaint, if the action remained in that court.

Madisonville Traction Co. vs. St. Bernard Mining Co., 196 U. S. 239. This case holds on p. 244, near the bottom of the page:

"If a case be a removable one, that is, if the suit in its nature be one of which the circuit court can rightfully take jurisdiction, then, upon the filing of a petition for removal in due time, with a sufficient bond, the case is in law removed, and the State Court in which it is pending, will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void."

[On margin:] O. K. J. A. McC.

In the case at bar, the petition showed divers citizenship, and that the amount in controversy exceeded $3,000, exclusive of interest and costs, and the wording and language used was in strict compliance with the requirements of the Federal statute. Therefore, on the face of the record, the case was removable, and was removed from the moment that the petition and bond was filed and accepted in the State Court. And this very case that the plaintiffs cited was removed from a State Court to Federal Court and the Federal Court refused to remand the action to the State Court, but it happened that plaintiffs have taken language used by the Court

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in deciding that case which had nothing to do with the
49 question then before the Court, yet disregarding this, plaintiffs have attempted to make great capital out of it in their brief.

Another case cited herein by the pliantiffs was Iowa Cen. Railway Co. vs. Bacon, 236 U. S., p. 357.

In that case, the petition showed that the amount in controversy was $1,990, where the statute required that the amount in controversy must be not less than $2,000, therefore, from the petition, it affirmatively appeared that the Federal Court did not have jurisdiction, and that the action was not removable. Moreover, that case was removed by the defendant in 1905, and was dismissed in Federal Court for failure to prosecute the action, and the plaintiff never made any motion to remand the action to the State Court, and never submitted or conceded that the action was removed to the United States Court, but about five years later, the plaintiff moved to amend *his* pleadings in the action in the State Court, and the defendant made a motion in the State Court to remove the action to the United States Court, not attempting to re-file a petition and bond. The State Court heard the argument on both sides upon the motion, of a case which was in its court, and had a right to decide whether the case should be removed or not, as the defendant voluntarily submitted himself to the jurisdiction of the State Court, and asked for its decision as to the removability of the action. Therefore, we do not see how these plaintiffs could make use of this case in support of their position.

[On margin:] O K. J. A. McC.

In the case at bar, on the contrary, the defendant never in any way, voluntarily submitted *itself* to the jurisdiction of the State Court, but the plaintiffs did submit themselves to the jurisdiction of the Federal Court, after the petition and bond for removal had been filed, and made a motion in the Federal Court to remand the action from that Court to the State Court, thus acknowledging that the action had been removed from the State Court, and was
50 pending, at the time, in the Federal Court, and that the Federal Court had jurisdiction to remand the action to the State Court. The judgment was rendered, however, by the City Court, between the time of the filing of the petition and bond for removal, and the entry of the order upon plaintiffs' motion, by the United States Court, remanding the action to the State Court.

Neither is the case of Tierney vs. Helvieta Swiss F. Ins. Co. 126 A. D. 446, directly in point, as the facts are different from those in the case at bar.

In the Tierney case the defendant submitted itself voluntarily to the jurisdiction of the State Court where a motion was made by it for an order vacating the order of removal of the action to the United States Court, previously obtained. Besides the petition on its face was defective.

In the case at bar, on the other hand, the defendant never submitted himself to the jurisdiction of the City Court from the time

that the petition and bond for removal of the action to the United States District Court, was filed by him according to the United States statutes above mentioned, until after the same case had again been remanded to the City Court, by order of Judge Hough, of November 16th, 1915.

[On margin:] O. K. J. A. McC.

Without burdening this Court, at present, with any further arguments respecting the application of the authorities relied upon by the plaintiffs herein, the attention of the Court is respectfully asked to another feature of the case, which may possibly have been overlooked, viz: that when the United States statutes above referred — required notice of intention to file the petition and bond for removal to be given by defendant to the plaintiffs, the obvious and reasonable purpose intended must have been to enable the plaintiffs to make any proper motion, or take any proper steps in the City Court to prevent such intended removal. Having failed to do this, and refusing to avail themselves of the opportunity thus given by that notice, said plaintiffs must properly be held to have waived
51 their right to appear afterwards in the City Court, and attempt to have such removal of the action into the United States District Court, in accordance with the statutes above mentioned, vacated or set aside. This act or failure of the plaintiffs to act therein, under such circumstances must be regarded as an estoppel against their right to assert the existence of jurisdiction in the City Court, after the removal of the action therefrom to the United States District Court, under the statutes aforesaid, and after due notice thereof given to the plaintiffs.

That for all of the reasons aforesaid, and upon the facts herein set forth, this deponent, on behalf of the appellant upon this appeal, respectfully begs leave herein to appeal from the determination of this Court, affirming the order of Mr. Justice La Fetra, dated October 25, 1915, and dismissing the appeal from the judgment of October 26th, 1915, to the appellate Division of the Supreme Court, First Department.

That an order to show cause herein, with stay of proceedings, is now asked for, for the reason that a regular notice of motion cannot be given for the December 1915 term of this Court, within the time prescribed by the rules and practice, and for the relief herein asked for; and that it was not possible, by reason of great stress of other engagements and the Christmas holidays intervening, to have said motion papers properly prepared for presentation and submission to this Court before this date.

[On margin:] O. K. J. A. McC.

That unless a temporary stay of plaintiffs' proceedings is granted herein, the defendant's rights and remedies herein will be seriously impaired, impeded and prejudiced, and his property taken away from him without any present remedy or means of redress being afforded him, and he will otherwise suffer great and irreparable loss and injury, while plaintiffs, in the meantime, are in nowise

prejudiced by such stay, but are amply secured by the judg-
52 ment, execution and proceedings aforesaid, wherein the defendant's property and bank account, in excess of $5,000 is tied up and secured to the plaintiffs.

That the present application to this Court is made in good faith and not for any purpose of delay, and that all the facts herein are within deponent's knowledge, and that in the event such application is granted herein, the said defendant and appellant will prosecute said appeal to the Appellate Division with all possible dispatch.

That no previous application for the leave herein sought has been made to any other Court of Justice.

E. G. DELANEY.

Sworn to before me this 28th day of December, 1915.

ONA RODER,
Comm. of Deeds, #276, New York City.

Comm. expires Jan. 20, 1916.

[On margin:] O. K. J. A. McC.

53 "A."

At a Stated Term of the United States District Court for the Southern District of New York, Held in the Postoffice Building, in the Borough of Manhattan, City of New York, on the 4th day of November, 1915.

Present, Hon. E. Henry Lacombe, Circuit Judge.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

An order dated the 27th day of October, 1915, having been made herein by Hon. Augustus N. Hand, United States District Judge, upon application of the defendant, by Edward G. Delaney, his attorney, which said order directed the plaintiffs or their attorneys, to show cause before this Court on the 29th day of October, 1915, why the said plaintiffs, their attorney or attorneys, agents and representatives, should not be enjoined and restrained from in any manner proceeding with or prosecuting the above entitled action, wherein Moses Feltenstein and Abraham Rosenstein are plaintiffs, and Baltrus S. Yankaus is defendant, in the City Court of the City of New York, and why any and all proceedings taken or had in said action in said City Court, or any order or orders or judgment entered therein in such City Court, since the date of the filing of petition and bond on removal in this action and since the filing in said District Court of the United States, for the Southern District of New York, on the 20th day of October, 1915, of the certified copy of the record herein, as prescribed by law and

54 the statutes of the United States, should not be vacated, set aside and declared null and ineffectual, and why the defendant herein should not have such other and further order or relief in the premises as might be just and proper; and the motion upon said order to show cause having duly come on to be heard before this Court on the 29th day of October, 1915, and the Court having heard Frank J. Felbel, of counsel for the defendant in support of said motion, and Abraham Rosenstein, one of the plaintiffs in person in opposition thereto, and due deliberation having been had,

Now on reading and filing the said order to show cause, dated October 27th, 1915, the affidavit of Edward G. Delaney, thereto annexed, verified the 22nd day of October, 1915, and the affidavits of Baltrus S. Yankaus, thereto annexed, verified on the 26th and 27th days of October, 1915, respectively, with due proof of service of copies thereof upon Virginius Victor Zipris, attorney for the plaintiffs and affidavit of Abraham Rosenstein, verified October 29, 1915, and on reading the certified copy of the record in the City Court of the City of New York, being the summons and complaint, notice of removal, the petition for removal duly verified, the affidavit of the attorney for the defendant, and the bond on removal, now on file in this Court, and upon reading the opinion filed on this motion, it is, on motion of Edward G. Delaney, attorney for the defendant,

Ordered, that until the further order of this Court, made upon proper notice and motion on the part of the plaintiffs, to remand said cause, and the entry and service of said order thereupon, the said plaintiffs, Moses Felten-stein and Abraham Rosenstein, their attorney or attorneys, agents, servants, or representatives, be and they are hereby enjoined and restrained from in any way proceeding with or prosecuting said cause of action in the City Court of the City of New York, or from collecting anything under any judgment entered therein.

Enter.

E. *EH*NRY LACOMBE,
Circuit Judge.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

55 [Endorsed:] Supreme Court, Appellate Term, First Department. Moses Feltenstein and Abraham Rosenstein, Plaintiffs-respondents, against Baltrus S. Yankaus, Defendant-appellant. Affidavit and Order to Show Cause. Edward G. Delaney, Attorney for defendant-appellant, 154 Nassau Street, Borough of Manhattan, City of New York.

56 City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

A judgment in this action, in favor of the plaintiffs and against the defendant, having been rendered in this Court on October 26, 1915, on defendant's default, in the sum of $882.78, and the defendant having appealed to the Appellate Term of the Supreme Court of New York, in and for the First Department, from the said judgment, and also from an order made by Hon. Edward B. La Fetra, one of the Justices of this Court, and entered herein on October 25, 1915, setting aside the removal of this action to the United States District Court, for the Southern District of New York, and declaring that this action was not removable to the said United States District Court and that this Court continue to retain jurisdiction of the action as though such removal had not been made, and the said order having, after due deliberation by the said Appellate Term, been in all things affirmed and the appeal from the said judgment dismissed, and an order of affirmance having been returned thereon on or about December 13, 1915, with $20 costs, and disbursements, to the plaintiffs respondents, and said Appellate Term having sent hither its remittitur, from which it appears that the said Appellate Term has affirmed the said order and dismissed the appeal from the said judgment, with $20 costs, and disbursements, and has remitted the judgment of said Appellate Term to this Court to be enforced according to law; and this Court having, by a further order, entered herein on December 17, 1915, ordered that said judgment and order of the Appellate Term be made the judgment and order of this Court with $20 costs, and disbursements, and the same having been duly readjusted by the Clerk of this Court for the sum of $46.38.,

[On margin:] O. K. V. P. O. K. J. A. McC.

57 Now, on motion of Virginius Victor Zipris, attorney for plaintiffs respondents herein, it is

Adjudged that the judgment of the said Appellate Term be and the same is hereby made the judgment of this Court; and that the plaintiffs respondents have judgment against the defendant appellant herein, in the sum of $46.38, costs and disbursements, and that plaintiff- have execution therefor; as well as for the amount adjudged to be recovered in and by the said judgment of this Court entered herein on October 26, 1915.

Judgment signed and entered this 17 day of December, 1915.

THOMAS F. SMITH, *Clerk.*

A copy.

[Seal City Court of the City of New York.]

THOMAS F. SMITH.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 10, '16. City Court, New York.]

[On margin:] O. K. V. P.

58 [Endorsed:] County Clerk's Index No. 11909 City Court of the City of New York. Moses Feltenstein, Ano., Plaintiff, against Baltrus S. Yankaus, Defendant. Judgment and Notice of Entry. Virginius Victor Zipris, Attorney for Pl'ff, 309 Broadway, Borough of Manhattan, New York City. To Edward G. Delaney, Esq.

59 Supreme Court, Appellate Term, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-respondents,
against
BALTRUS S. YANKAUS, Defendant-appellant.

(Dismissed Appeal from Order of Schmuck, J.)

CITY AND COUNTY OF NEW YORK, *ss:*

Abraham Rosenstein, being duly sworn, deposes and says: He is one of the plaintiffs in this action.

The defendant moves for leave to appeal to the Appellate Division from the Order of this Court which dismissed an appeal taken by the defendant from an order made herein by Mr. Justice Schmuck, about December 3rd, 1915, denying defendant's motion to vacate the judgment heretofore rendered by default, on the ground that the same is void, because it was rendered while at a time that the case had been removed as defendant claims to the Federal Courts, and that it was against the Constitution of the United States, because it took away property rights of the defendant, and a number of other grounds, which are specified in the motion papers.

Deponent in the brief time that he has had since the order to show cause was served to look up the question, expresses extreme doubt as to whether the defendant has a right to secure leave to appeal to the Appellate Division from an order dismissing an appeal.

[On margin:] O. K. J. A. McC.

But assuming that this Court has the right, then the decision of this Court in dismissing the appeal was correct. The ground for the dismissal was that the questions arising on the appeal had become academic by reason of the fact that this Court had already decided just prior thereto, the appeal taken from Judge La Fetra's
60 opinion and from the judgment, where the precise questions arising on this appeal had come up, and as this Court had affirmed Judge La Fetra's opinion which had decided that this Court continued and retained jurisdiction in spite of the filing of the jurisdictionally defective petition on removal, it necessarily followed that the judgment entered after defendant's default in pleading was proper. That therefore the appeal from the judgment could serve no useful purpose as it would be an examination into the precise questions decided in the earlier appeal, and that therefore, the decision of this Court on the appeal would be purposeless.

That plaintiffs likewise on that motion to dismiss raised the que
tion that the early appeal taken not only appealed from Judge L
Fetra's order retaining jurisdiction of the case but as well appeale
from the precise judgment which it was sought to set aside b
defendant's motion and that this Court had passed on the appe
from the judgment taken by the defendant, and had in fact in i
determination affirming the order of Judge La Fetra, as well decide
to dismiss the appeal from the judgment.

A reading of the printed papers on the case will show in th
notice of appeal both from the order of Judge La Fetra and fro
the judgment and that all the papers respecting both the entry
the judgment and the entry of such order, were printed in ful
That therefore this Court had determination upon the precise ma
ters in the earlier appeal. These facts being presented to this Cou
it dismissed the defendant's appeal taken from Judge Schmuck
order.

[On margin:] O. K. J. A. McC.

Deponent deems it unnecessary to recite the history of the occu
rence in this action, but attaches hereto an affidavit that is being i
terposed at the same time that this one is on the motion made b
the defendant herein, for leave to appeal to the Appellate Divisio
from this Court's determination on the appeal taken from Judge L
Fetra's order and deponent verily believes that said affida
61 as well as the opinion of Judge Hough attached, is a sufficie
answer to the matter set forth in defendant's affidavit on th
motion.

There is absolutely no constitutional question involved, except
evolved from the mind of the defendant whose attitude from t
beginning has been one of defiance and contempt as the Court w
perceive from the numerous proceedings that the defendant has tak
to attack the State Court's jurisdiction in the matter.

ABRAHAM ROSENSTEIN.

Sworn to before me this 30th day of December 1915.

ROSE ADLER,
Notary Public, Bronx Co.

Cert. filed N. Y. Co.

[On margin:] O. K. J. A. McC.

COPY BOUND

62 Supreme Court, Appellate Term, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

(Appeal from Judgment and Order, La Fetra, J.)

CITY AND COUNTY OF NEW YORK, *ss:*

Abraham Rosenstein, being duly sworn, deposes and says:

Plaintiffs ask leave of this Court to appeal to the Appellate Division from an affirmance of this Court, without opinion, of an order of the City Court which had set aside an attempted removal of this cause from the City Court to the Federal Courts, and declaring that the action was one not removable. This Court had likewise dismissed the appeal taken from the judgment entered on defendant's default after said order had been entered.

The only question of fact which defendant asserts was overlooked by this Court on the appeal is stated at folio 31 of defendant's affidavit to be that before he, defendant, had filed a petition and bond on removal to the Federal Court, he had given ample notice of the fact that he was going to make the application, and that therefore plaintiffs had ample opportunity to take steps to avert the removal.

[On margin:] O. K. J. A. McC.

All the notice that defendant gave before filing his petition and bond was a notification given October 15th, 1915, to the effect that he annexed a copy of the petition and bond, which he would file in the office of the Clerk of this Court, on October 16, 1915. The Record on Appeal shows this notice. (Case Fol. 85.) No time and place is given when plaintiffs could have their opportunity to oppose defendant's move.

63 Of course it is absurd to claim that this was a notification which in any form or manner could be opposed, or that the plaintiffs could have in any way prevented the filing of such papers. After the defendant did file such papers, and which he states had the effect instanter to remove the case to the Federal Court, the plaintiffs took the only step that was open to them, viz.: to secure the City Court's ruling that the attempted removal be set aside, and that the Court determine that the action was not a removable one and declare that the action had not been removed to the United States Court, and that the City Court continue to retain its jurisdiction as though such removal had not been attempted or made.

Deponent made such application returnable in the City Court at Special Term, and the defendant appeared, interposed affidavits and argued against the application in an effort to sustain the removal.

Defendant's attorney, at folio 7 of his affidavit in this application, leads one to the belief that Judge La Fetra's order was made ex parte. Judge La Fetra, however, after due deliberation on the matter, made

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an order on October 25th, 1915, granting the relief plaintiffs asked for, and wrote the following opinion:

"Feltenstein vs. Yankaus. Motion granted. Even should the notice of the filing of the petition and bond be deemed sufficient within Section 29 of the Federal Judicial Code, the facts set forth in the petition fail to show the amount in dispute exceeds $3,000. In determining the question of amount in dispute the sum claimed in the action is to be considered, and not the amount of the proposed counterclaim (McKown vs. Kansas & T. Coal Co., 105 Fed. 657; Crane Co. vs. Guanica Centrale, 132 Fed. 173). Settle order on one day's notice."

There was presented to Judge La Fetra the fact that the complaint in this action showed a cause of action to recover the sum of $800 damages under a written contract of retainer and for loans and for which a money judgment for $800 was demanded.

[On margin:] O. K. J. A. McC.

64 It was the contention there of the plaintiffs, that by virtue of the Federal Statutes, the only cases where a removal was properly effected, was in a case where "a party entitled to remove any suit mentioned in the last preceding section," may file a petition, etc.

U. S. Comp. Stat., Sec. 1011 (Judicial Code, Sec. 29.)

By virtue of the provision just quoted, only such suits can be removed "of which the District Courts of the United States are given original jurisdiction by this title."

U. S. Comp. Stat. Sec. 1010.

Under the provisions of that act, the District Courts of the United States are given original jurisdiction only "where the matter on controversy" excluding interest and costs, exceeds in value the sum of $3000.

Now the petition filed by the defendant on the attempted removal, ever silent of the nature of plaintiffs' cause of action, and purposely omitting to state the nature of plaintiffs' claim and the amount of money they demanded in the complaint, urged in the petition that the case was removable, because he claimed therein that "by way of his counterclaim which your petitioner claims to exceed the sum of $3,000 exclusive of interest and costs."

After the rendition of Judge La Fetra's opinion and entry of the order thereon, defendant then being in default in said City Court, plaintiffs entered a judgment against him for $882.78 on October 26th, 1915. The correctness of Judge La Fetra's decision was unquestionable.

Orr v. Baltimore & O. R. Co., 83 Misc. 221; 145 Supp. 378.
Tierney v. Helvetia Swiss Fire Ins. Co., 126 App. Div. 446; 110 Supp. 613.

[On margin:] O. K. J. A. McC.

65 Iowa Central R. R. Co. v. Bacon, 236 U. S. 305, at p. 309.

The defendant, not satisfied with Judge La Fetra's decision, proceeded to the United States District Court of this District, for relief, and secured an order to show cause from United States District Judge Hand, dated October 27th, 1915, returnable October 29th, 1915, in which he complained and asserted that the case had been properly removed to the United States Court, and after stating some of the foregoing facts, requested that that Court enjoin the plaintiffs from proceeding in the above entitled action, and further that all proceedings from the time of the filing of his petition on removal in the City Court, should be vacated and set aside, declared null and ineffectual, and for other relief.

[On margin:] O. K. J. A. McC.

That the said application came on to be heard at the Federal Term for motions before Circuit Judge Lacombe, who then sat in the motion part, and there, from the bench, Judge Lacombe expressed his opinion, that he could not grant the defendant the relief asked for and that from his knowledge of the cases, there was too much doubt as to the right of a removal upon the ground that a counterclaim exceeded the jurisdictional sum, and he stated that the determination of such question ought to come up properly on a motion to remand, a step which he suggested that the plaintiffs take. The defendant had argued before Judge Lacombe on that application that the United States Court was a proper tribunal to determine the question of removal, even if the petition filed in the State Court was fatally defective because jurisdictional facts were not shown. Deponent, while conceding that the Federal Court had jurisdiction, urged and argued that the State Courts had concurrent jurisdiction to determine the same question. Judge Lacombe, following out his remarks on the bench, refused to vacate the judgment and order of the State Court as asked for by defendant, but he stayed plaintiffs from proceeding under the said judgment, until plaintiffs made a motion to remand as he had suggested.

66 His order is attached to the motion papers.

After the argument, Judge Lacombe wrote a brief decision in which he set forth that jurisdiction was too doubtful for the Federal Court to retain jurisdiction and cited his own decision made about six years before wherein he had remanded a cause to the State Court because of the doubt in the Federal decisions as to whether counterclaim could be considered in determining as to whether the "matter in controversy" exceeded $3,000. Crane Co. v. Guanica, 132 Fed. 713.)

A reading of Judge Lacombe's decision will convince one that Judge Lacombe made no effort whatever to go any further into the question other than to decide that the questions should be thoroughly thrashed out on a motion to remand, as he granted a stay only temporarily until the motion to remand was made, and his brief opinion indicates that he merely skimmed the surface of the question, leaving it to the application on remand to cover the entire question.

Judge Lacombe's remark as to the effect that this case was there (in the United States Court), was merely obiter, as Judge Lacombe

only stayed plaintiffs' proceedings under the judgment with the advice that plaintiffs proceed by a practice which he pointed out. To him was not at all given for adjudication the question as to whether the State Courts have concurrent jurisdiction or otherwise.

[On margin:] O. K. J. A. McC.

Following Judge Lacombe's advice and suggestion that the matter could and should be heard on a motion to remand, where the question of jurisdiction could be squarely brought up, and as well to dissolve Judge Lacombe's stay, deponent promptly made an application in the United States Courts for an order that the case be remanded to the City Court on the grounds above set forth and secured an order to show cause on November 1st, 1915, returnable on November 5th, 1915, based on deponent's affidavit, in which deponent recited briefly such of the above facts as were material
67 to that application. In that application, deponent particularly called the Court's attention to the fact that he was following the suggestion of Judge Lacombe to remand and throughout his affidavit urged that the case was not one which was entitled to be removed and was not a removable case, and that the plaintiffs sought the Court's relief in order to get free from the temporary stay that had been granted by Judge Lacombe, and in which the plaintiffs also urged that the plaintiffs had proceeded to judgment under various decisions which allowed the State Court to continue with the case, the case not being one "entitled" to removal because of jurisdictionally fatal defects in the petition.

After due and thorough hearing, Judge Hough, who read the record, rendered an exhaustive opinion which is hereto annexed and made part hereof and which was also contained in the printed brief of respondents, in which Judge Hough declared that the precise petition under review was wholly and fatally jurisdictionally defective and immediately remanded the case to the State Courts with costs.

But says the defendant, Judge Hough inadvertently overlooked the fact that defendant had filed an answer in the Federal Court on November 8th, 1915, which was several weeks after plaintiffs entered a judgment in the City Court. (Fol. 13, defendant's aff.)

[On margin:] O. K. J. A. McC.

Whether the defendant omitted or neglected to refer to the fact in his answering affidavit before Judge Hough or omitted to submit his answer to that Judge, deponent does not know. It has no bearing whatever on the subject. For what Judge Hough considered and what could only be considered in this case, was as to whether the petition on removal which was the lever by which defendant claims he lifted the case into the United States Courts, was jurisdictionally fatal or not. The Court would not be influenced by any subsequent process or paper in the matter, and as Judge Hough says, by virtue of the latest (1887) provisions of the Federal
68 Removal Act, only process before the defendant's pleading can be taken into consideration. If the defendant took a

chance of filing his answer in the Federal Courts and ignored absolutely the entry of the judgment in the State Court, that was a matter of his own making. He purposely ignored and defied the State Courts, and did not even make any attempt to set aside the judgment entered October 26th, 1915, but resorted to every possible method in the Federal Courts and after being defeated before Judge Hough he suddenly woke to the idea that he ought to re-apply to the State Courts. He then about November 28th, more than a month after the judgment was entered, applied to the City Court to set aside the judgment as void.

These kind of tactics certainly ought not to gain the sympathy of the Courts.

At no time did the State Court ever relinquish jurisdiction and it was only in the Federal Courts because, the defendant through his attitude and actions and motions forced plaintiffs there by his motion for stay which the plaintiffs were obliged to defend, and by the plaintiffs' motion to remand, which Judge Lacombe urged and suggested should be followed to relieve the matter from the burden of the temporary stay he had granted upon defendant's application.

[On margin:] O. K. J. A. McC.

In deponent's opinion, whatever Judge Lacombe ventured to say in the statement which the defendant has obstinately and repeatedly called to the attention of this Court, the City Court and the Federal Courts, was merely the opinion of Judge Lacombe's that for purposes of proceedings to remand, the cause was in that Court. He surely could not and did not intend that the entire case for disposition was in that Court, for by his very opinion he said that "jurisdiction is too doubtful to warrant the Court in retaining the case." What the Court evidently meant by retaining the case was, retaining it merely for the purpose of shifting it back by remand. He could not have meant anything else.

69 But defendant says, that by virtue of these two applications in the United States Court, plaintiffs have recognized the jurisdiction of the Federal Courts in the matter. This is absurd as appears from the statements shown above, that the plaintiffs were compelled to repel the defendant's unjustified attacks in the Federal Courts and the cases back up our contention decidedly.

Crane Co. v. Guanica Centrale, 132 Fed. 713. (C. C. N. Y.)
Tierney v. Helvetia Swiss F. Inc. Co., 126 App. Div. 416; 110 Supp. 613.

On the contrary we consider seriously as to whether by the various notices and affidavits shown in the printed papers on appeal herein, if the defendant has not subjected himself to the City Court's jurisdiction; as defendant does not seem to have appeared specially, and throughout defendant refers to himself as "defendant" in the action.

Plaintiffs were compelled to prosecute the application to remand in the Federal Court not only to secure freedom from the temporary stay granted by Judge Lacombe, but as respectable authority holds,

if the plaintiffs had failed to institute such proceedings to remand, it would have been considered a waiver of all objections to the removal.

Todd v. Cleveland M. R. R. Co., 65 Fed. Rep. 145.

At any rate, after the plaintiffs had secured the remand of the case to the City Court, where it really always and truly was, defendant prosecuted to this Appellate Term the appeal which he had taken from Judge La Fetra's order, and where he urged again the very same and precise ground that he then and thereafter repeatedly has urged, viz.: that his position was sufficient in form, and that it state- jurisdicitional facts, in spite of the fact that Judge Hough had declared it wholly insufficient.

[On margin:] O. K. J. A. McC.

Prior to the argument of this appeal deponent had moved this Term to dismiss the appeal from the judgment because it had been granted on default, as an appeal could not be taken from a default judgment. In opposition the defendant urged that a void judgment could be questioned on appeal from the order which was made the basis of the judgment. This Court denied the plaintiffs' motion, but when it rendered its final determination it not only sustained and affirmed Judge La Fetra's order but as well dismissed the defendant's appeal from the judgment. Probably in rendering its denial of plaintiffs' motion to dismiss the appeal from the judgment, it was thought that the proper time to do so would be when the appeal came up, which it did.

70

The Court will observe that the judgment was entered by default in plaintiffs' favor on October 26th, 1915, one day after, or the same day, Judge La Fetra signed the order which was appealed from as above stated. To stay plaintiffs from proceeding under the said judgment, and again insisting that the judgment was void and of no effect because of the timeworn objections he insisted on repeating defendant secured from Judge McAvoy, of the City Court, an order to show cause, dated November 20th, 1915, and returnable December 3rd, 1915, in which he asked that the aforesaid judgment be vacated and set aside on the ground that at the time the said judgment was rendered this action was not pending in this Court; further, that the City Court had no jurisdiction over the subject matter of the action; further, that the only action pending between the parties hereto was an action in the Federal Court and none pending in this Court at the time; further, that the judgment was contrary to and in violation of the Federal Statutes; further, that the rendition of the judgment and the seizure of defendant's property constituted an unlawful taking without due process of law in violation of the Constitution of the United States, particularly the 14th Amendment, Section 1 thereof; further, that the rendition of said judgment was an invasion of the defendant's civil rights under the Constitution and laws of the United States, and requested that the judgment and all other steps taken subsequent to the judgment be vacated and set aside.

[On margin:] O. K. J. A. McC.

71 That said motion come on to be heard on December 3rd, 1915, before Mr. Justice Schmuck, of the City Court, and there a portion of the above facts were presented to Judge Schmuck for his determination and which had occurred up to that time. Judge Schmuck's attention likewise was called to the fact of the occurrences and proceedings before Judge La Letra and of the fact that an appeal from Judge La Fetra's order was about to be argued, and although the judgment debtor urged that the application sought entrely different relief, viz: from the judgment that was entered subsequent to the making of Judge La Fetra's order, Judge Schmuck directly denied the motion

An appeal was then taken by the judgment debator on December 9th, 1915, from Judge Schmuck's order.

That after this Court had affirmed Julge La Fetra's order and likewise dismissed the appeal from the judgment, deponent moved this Court to dismiss the appeal from Judge Schmuck's order on the ground that the precise question had been argued and decided by this Court on the appeal from Judge La Fetra's order, and that the very judgment which was now sought to be set aside and vacated in the applica*y*ion before Judge Schmuck, was the very judgment which had been appealed from in connection with Judge La Fetra's order, and had received this Court's consideration, and that the questions therefore became academic and the decision on the appeal would become purposeless. That this Court heard such application and as deponent is informed and verily believes, the defendant opposed the application and again presented the above mentioned facts and his contention, and which are the very precise ones which he now urges upon this motion, and this Court after due deliberation, on December 20th, 1915, handed down a decision granting plaintiffs' motion to dismiss the said appeal from Judge Schmuck's order.

[On margin:] O. K. J. A. McC.

72 After plaintiffs had secured the judgment, they issued execution to the Sheriff of New York County, and he reported that he was unable to find property on which to levy, but plaintiffs having discovered that the defendant had moneys on deposit in the Equitable Trust Company, Colonial Branch, secured a third party order, and discovered from examination, that defendant had nearly $5,000 on deposit. The judgment herein being for about $882, these plaintiffs notified both the said bank and the defendant's attorney herein, that the plaintiffs only made claim on a $1,000 of the deposit.

Upon such examination, these plaintiffs based proceedings under Section 2447 of the Code, returnable before the Chief Justice of the City Court, who had issued the third party order against the Bank, and prayed that the defendant and judgment debtor be directed to turn over a sum of money sufficient to pay the said judgment, Sheriff's fee and poundage, interest on judgment and other legitimate expenses and for costs of the proceedings.

The matter came on before the Chief Justice, in which matter the defendant and judgment debtor appeared by counsel and opposed

the same, and in fact interposed defendant's affidvait, in which he gave reasons why he should not be directed to turn over said moneys But Judge O'Dwyer, after due deliberation and after briefs on the law had been handed to him, on December 3rd, 1915, signed an order directing defendant to turn over above described moneys under his control.

[On margin:] O. K. J. A. McC.

A copy of said order to turn over was served on the defendant's attorney about December 4th, 1915, and the defendant was finally served after much difficulty on December 7th, 1915, with a certified copy thereof, but defendant has seen fit not to comply with the said order for he allowed the three days which is directed therein, in which he is to comply with it, to go by without making any move or application. In fact, said Chief Justice had advised defendant's counsel to apply to open the defendant'- — and that he, the said Chief Justice, would delay the entering of an order until such thing was done, but defendant's attorney repudiated the Court's sugges-
73 tion and stated that he was going to take an attitude that the judgment should never have been entered, and that he was going to stick to that attitude.

Plaintiffs were thereafter compelled to resort to an application to punish defendant for his contempt for failing to obey the order of said Chief Justice, and his only defense thereto was a repetition of all the same contentions that had been so repeatedly declared untenable in all of said Courts, and the Judge hearing such last mentioned application again offered defendant at the behest of deponent, to come in and defend this action, but he spurned the Court's offer urging that he wanted to preserve his right to damages against plaintiffs because of the entry of said judgment which he thought he would waive if he came in and defended on the merits.

In view of the attitude of the defendant and his defiance of the Court's orders and his continuous and repeated refusal and insistence of the repudiation of the Court's jurisdiction of the matter, it is submitted that the Court should deny defendant's application.

About December 23rd, 1915, deponent was served with subpoena and bill of complaint in an action brought by defendant herein against the plaintiffs herein in the District Court of the United States, for this District, in a suit to vacate and set aside the aforesaid judgment, which complaint on its face was wholly demurrable. The service of such papers, however, did not act as a stay, and in fact several days after deponent was served with the papers, said defendant served an order of discontinuance of that action procured in the Federal Court.

[On margin:] O. K. J. A. McC.

Defendant maintains that this Court has overlooked or misunderstood the decisions cited in respondent's brief. It is pitiable to observe how futile his attempts are in distinguishing respondent's cases. We let the brief speak for itself. We stand by every case we have cited therein to maintain the order and judgment appealed from. The new case the appellant claims to have dis-
74 covered (Buxton v. Pa. Lumber Co., 221 Fed. 725), merely

decided, as his extract shows, that the State Court's consent or order is not necessary to effect a removal. No one ever disputed that, and Respondents never breathed a dissent to that proposition. A reading of that case shows that at Page 724.

"There is nothing to indicate that the causes were not removable or that they were not properly removed save the attempted retention of jurisdiction by the State Court.

Furthermore, after a hearing, the Federal Court by refusing to remand, decided that it had jurisdiction while the State Court apparently listened to no argument and took no final action on the petition for removal; it simply went on with the cause.

Certainly a condition which is entirely contrary to what appears in the case at bar, where jurisdictional facts affirmatively were shown were wanting.

One thing is certain: The State and Federal cases cited in our brief positively hold that the State Court is not ousted of jurisdiction if the petition is fatally jurisdictionally defective. This Court, Judge Hough, Judge Lacombe and Judge La Fetra, have all held the petition in question fatally defective.

Defendant asserts that "important questions of law" principles herein involved are of importance to others than the parties in litigation," "questions involved in this case will affect great interests" and "will necessarily settle important principles of law affecting numerous cases" (fol. 16), but fails dismally in presenting one solitary fact to support these broad generalities. Flinging constitutional points into the ring do not tend to raise the case at bar higher up than other one where appellant has tried out every means to prevent plaintiffs from collecting a judgment procured for moneys loaned, and on a written contract of retainer.

Deponent therefore prays that this Court deny the application for leave to appeal, with costs.

ABRAHAM ROSENSTEIN.

Sworn to before me this 30th day of December, 1915.

ROSE ADLER,
Notary Public, Bronx County.

Cert. Filed in New York Co.

[On margin:] O. K. J. A. McC.

75 District Court of the United States, Southern District of New York.

MOSES FELTENSTEIN et al.
vs.
BALTRUS S. YANKAUS.

Action at Law.
Motion to Remand to the City Court of New York.

Mr. Zipris for plaintiff and motion.
Mr. Delaney for defendant, opposed.

Memorandum by Hough, J.

When this matter was argued the record on removal was not in Court. If it had been the motion would not have been held until now. The opinion of Judge Lacombe in Crane Co. vs. Guanica Centrale, 132 Fed. Rep. 713, merely states what for many previous years had been the practice of this Court,—i. e. doubtful cases were always remanded.

Rulings of this nature are admittedly unsatisfactory. Counsel and parties are entitled to a clearcut statement of the law if it is possible to make one;—and it would seem as if the removal acts were sufficiently old by this time to enable a Court to elect what appeared to be the best of conflicting rules.

Since no case (irrespective of amount involved) can be removed over which the United States might not have had original jurisdiction, it has always seemed to me illogical to consider a counterclaim in ascertaining the propriety of removal or remand.

In the State of New York there is no compulsion on a defendant to set up a counterclaim. It is always optional with the party possessing it to reserve his affirmative demand for an independent suit.

Imagine this action brought originally in this Court; the defendant would only have been obliged to appear and move on the pleadings to dismiss the complaint without prejudice. Such a motion would have been granted as of course.

Thus is appears that an action of the most trifling nature may (under defendant's contention) be removed to this Court at the option of defendant if he can assert a counterclaim of sufficient size. That this was never the intent of the statute I am clear. Considering, however, the confusion of decisions and (so far as I know) the failure of late years to observe the difference between the Act of 1875 and that of 1888, I should have felt impelled to consider and classify decisions were it not for the consideration next to be stated. If it be true that by a preponderance of rulings that affirmative claims set up in an answer are to be considered in determining jurisdiction, it is at least necessary that somewhere and in some shape the defendant who sets up counterclaims shall plead them in a manner which en-

ables his opponent to criticise them, modify them or expunge them as may be proper under the rules of good pleading.

[On margin:] O. K. J. A. McC.

76 In this case,—and in any similar case under the Act of 1888 there is no answer. The only knowledge that to this moment plaintiff has regarding defendant's counterclaim is contained in the petition for removal,—the language of which petition sets forth no reason whatever for the recovery by the defendant from the plaintiff of any sum of money at all. The petition says in substance that the defendant has a counterclaim, without stating what it is. Whatever may be the preferred rule, when in a proper and formal manner the amount in controversy between the parties is made to appear and shown to exceed $3,000 exclusive of interest and costs;—I fell justified in holding, and do hold, that it is impossible to show that such controversial amount exists in any such manner as this defendant has attempted.

For this reason the motion to remand is granted with $20 costs. Nov. 15, 1915.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk*.

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

77 [Endorsed:] Supreme Court, Appellate Term, 1st Department. Moses Feltenstein and Abraham Rosenstein, Plaintiffs-resp'd't, against Baltrus S. Yankaus, Defendant-app'l't. Affidavit in Opposition. Virginius Victor Zipris, Attorney for Plaintiffs, 309 Broadway, Borough of Manhattan, City of New York.

78 At a Term of the Supreme Court Held for the Hearing of Appeals from the City and Municipal Courts of the First Judicial Department, at the County Court House, in the City of New York, Borough of Manhattan, on the 31st Day of December, 1915.

Present:

Hon. Charles L. Guy,
" Alfred R. Page,
" Eugene A. Philbin,
Justices.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Order on Motion for Leave to Appeal to the Appellate Division.

The appeal in the above entitled action having been dismissed upon appeal by the Appellate Term, of the Supreme Court, and the defendant having moved for leave to appeal to the Appellate Division, First Department, from the determination of said Appellate Term.

Now upon reading and filing the notice of Motion dated the 28th day of December, 1915, and due proof of service thereof and the affidavits of Baltrus S. Yankaus, verified the 27th day of December, 1915, in support of said motion, and the affidavit of Abraham Rosenstein, verified the 30th day of December, 1915, in opposition,

It is ordered that said motion for leave to appeal to the Appellate Division, First Department, be and the same is hereby dismissed and stay vacated, with $10 costs.

Enter.

C. L. G.,
Justice Supreme Court, Sitting in App. Term.

A copy.

[Seal of Court.]

T. F. SMITH, *Clerk.*

A copy.

[Seal City Court of the City of New York.]

WM. F. SCHNEIDER, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

79 SIR: Please take notice that the within is a true copy of an order duly made and entered in the within entitled action, and filed in the office of the Clerk of the within named Court at his

office County Court House, in the County Court House, in the City of New York, Borough of Manhattan, the 31 day of December, 1915.

Dated, N. Y., Jan. 3, 1916.

Yours, etc.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Pl'ff.

Office and Post Office Address, 309 Broadway, Borough of Manhattan, New York City.

To Edward G. Delany, Esq., Attorney for Def't.

[Endorsed:] Supreme Court, New York County. Moses Feltenstein and Abraham Rosenstein, Plaintiff-, Resp., against Baltrus S. Yankaus, Defendant, App. Order and Notice of Entry. Virginius Victor Zipris., Attorney for pl'ffs-resp'd'ts, 309 Broadway, Borough of Manhattan, New York City.

80 Supreme Court, Appellate Division, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Appeal from Judgment and Order.

Decided December, 1915, Term, App. Term.

Notice of Motion.

(21.)

[On margin:] O. K. J. A. McC.

SIR: Please take notice that upon the annexed affidavit of Edward G. Delaney, verified the 5th day of January, 1916, upon the printed record and papers on appeal to the Appellate Term of the Supreme Court, First Department, from a judgment entered in the City Court of the City of New York, on the 26th day of October, 1915, for the sum of $882.78, in favor of the above named plaintiffs, and against the defendant, and from an order of Mr. Justice La Fetra, one of the Justices of the said City Court, dated October 25, 1915, vacating and setting aside the removal of this action from said City Court to the United States District Court, for the Southern District of New York; upon the determination of the said Appellate Term, affirming said order appealed from, and dismissing the appeal from said judgment, made at the December 1915 term of said Court; and upon all the other papers and proceedings herein, a motion will be made at the Appellate Division of the Supreme Court, First Department, to a justice of said Appellate Division, First Department, at the Appellate Division Court House, Madison Ave., Cor. 25th Street, in the

Borough of Manhattan, City of New York, on the 21st day of January, 1916, at 10 o'clock A. M. of that day, or as soon thereafter as counsel can be heard, for the allowance of an appeal to be taken to such Appellate Division, from the determination of said
81 Appellate Term, First Department, pursuant to Section 1344 of the Code of Civil Procedure, and the rules and practice of this Court; and for such other and further relief in the premises, as may be just and proper.

Dated, New York, January 5th, 1916.

Yours, etc.,

EDWARD G. DELANEY,
Attorney for Defendant-Appellant, 154 *Nassau Street, Borough of Manhattan, City of New York.*

To: Virginuis Victor Zipris, Esq., Attorney for plaintiffs-respondents, 309 Broadway, Borough of Manhattan, City of New York.

[On margin:] O. K. J. A. McC.

82 Supreme Court, Appellate Division, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Affidavit.

STATE OF NEW YORK,
City of New York, County of New York, ss:

Edward G. Delaney, being duly sworn, deposes and says:

I am the attorney for the defendant and appellant in the above entitled action.

[On margin:] O. K. J. A. McC.

That on or about November 5, 1915, an appeal was duly taken by the defendant, to the Appellate Term of the Supreme Court, First Department, from a judgment entered on October 26, 1915, in the City Court of the City of New York, in favor of the plaintiffs and against said defendant, for the sum of $882.78, and from an order of Mr. Justice La Fetra, of said City Court, dated October 25, 1915.

That the appeal from said judgment was taken upon the ground that such judgment was void, and was rendered at a time when said action was no longer in the said City Court, but had been removed to and was at such time actually pending in the United States District Court, for the Southern District of New York, by virtue of the laws and statutes of the United States, (U. S. Comp. Stat., Secs. 1010 and 1011; Jud. Code, Secs. 28 and 29) governing such cases, and that the same was in violation of the defendant's right under the Constitution and laws of the United States, and was a taking
83 of property without due process of law, and that said United States District Court was at such time alone vested with juris-

diction in said action, and that the City Court was, by the removal of such action, under the statutes aforesaid, without jurisdiction or authority to make or render any judgment in that action.

That the appeal from said order of Mr. Justice La Fetra, dated October 25, 1915, was taken upon the ground that said order, for the reasons above set forth, was void and without jurisdiction.

That this deponent begs leave to refer upon this motion, and to make a part hereof, the printed papers on appeal to said Appellate Term, from said judgment and order, and to the brief of appellant therein, for a more particular statement of the facts and of the law and authorities relied upon by the appellant upon said appeal.

That the following is a very brief statement of the facts in this case, as set forth in the printed papers on appeal herein, to wit:

The action was originally commenced in the City Court of the City of New York, and the summons and complaint therein were served on the defendant on October 11, 1915.

That before the expiration of the six days time allowed by law in which to plead in said action in said City Court, and before answering therein, the defendant caused a petition and surety company bond, duly approved, to be filed on October 16, 1915, in said City Court, for the removal of the action from that Court, into the United States District Court, for the Southern District of New York, pursuant to the U. S. Comp. Stat., Secs. 1010 and 1011; Jud. Code, Secs. 28 and 29, which read in part as follows:

[On margin:] O. K. J. A. McC.

"Sec. 28. Any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be
84 brought in any State Court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. * * * And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district. * * *

Sec. 29. Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court, to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his

or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit.

Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid, in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

That on October 15, 1915, a copy of said petition and bond, with written notice of intention to file the same, on October 16, 1915, was given to the plaintiffs in the action, as required by the statutes above mentioned.

[On margin:] O. K. J. A. McC.

That on October 20, 1915, a certified copy of the record on removal of said action was duly filed in the United States District Court, for the Southern District of New York, and said
85 defendant in that action was allowed thirty days from said last mentioned date, within which to answer, plead or demur to the complaint in said action, as more fully provided for by the statutes aforesaid.

That on or about November 8, 1915, while said action was still in the United States District Court, and before the expiration of the thirty days' time above mentioned, said defendant caused to be filed his answer to the complaint in said action in the United States District Court, for the Southern District of New York, as provided by the statutes above mentioned, and to which said answer I hereby beg leave to refer on this motion.

That after the removal of said action from said City Court to said United States District Court, for the Southern District of New York, pursuant to and in conformity with the provisions of the statutes above mentioned, said plaintiffs, upon a motion made by them in the City Court, obtained from Mr. Justice La Fetra of said City Court, an order dated October 25, 1915, purporting to vacate and set aside the removal of said action to the United States District Court, in the manner and as provided by the United States statutes aforesaid, and declaring in said order that said City Court continued to retain jurisdiction of the said action.

That on October 26, 1915, immediately following the entry of the said order of Mr. Justice La Fetra, and without notice of any kind to said defendant, the plaintiffs entered a judgment in the said City Court of the City of New York, in favor of the plaintiffs and against the defendant, for the sum of $882.78.

[On margin:] O. K. J. A. McC.

That thereupon, and on or about October 27, 1915, said plaintiffs issued execution upon said judgment against the property of the said defendant, and seized and attached the bank account of said defendant, with the Equitable Trust Company, of the City of
86 New York, amounting to the sum of over $5,000, and by third party order in supplementary proceedings therein, tied up said moneys and property of said defendant, so that he was and still has been unable to use and dispose of said moneys and property, and that thereafter the said plaintiffs obtained an order from one of the Justices of said City Court, requiring the said defendant to deliver and turn over to the Sheriff of the County of New York, sufficient of such moneys or property to satisfy the said judgment of October 26, 1915, with interest, costs and Sheriff's fees, and the costs of supplementary proceedings, allowed by order of the said City Court, made in said proceedings.

That after the entry of said judgment, on said 26th day of October, 1915, and the issuance of execution thereunder, and after the proceedings taken by plaintiffs to enforce said judgment, the defendant made a motion on October 29, 1915, in the United States District Court, for the Southern District of New York, to which said Court the action had been removed, and in which it was then pending, to restrain and enjoin said plaintiffs from proceeding further in the said City Court, to enforce the payment and collection of said judgment, while the said action was in the United States District Court as aforesaid.

That Circuit Judge Lacombe, before whom the motion in said United States District Court was heard, granted the said motion of defendant, and on November 4, 1915, an order was made and signed by the said Judge, a copy of which order is hereto annexed and marked "A," enjoining the said plaintiffs from further proceeding in said City Court, or attempting to collect said judgment, and until said action was properly remanded, as more particularly appears from said order.

[On margin:] O. K. J. A. McC.

That after the decision of said Circuit Judge Lacombe, upon the motion aforesaid, and in which memorandum of decision made by him, said Judge held and decided that the said case was then in the United States District Court and not in the City Court,
87 until it should be remanded by proper motion made in the United States District Court, the plaintiffs moved upon notice, in said United States District Court, for an order to remand the said action then in that Court, to the said City Court of the City of New York, and that after such motion had been heard and decided by District Judge Hough, before whom the same was argued, an order of said Judge was thereupon entered by the plaintiffs, dated November 16, 1915, and a copy of said order was served on the defendant, remanding said action to the City Court of the City of New York.

That in the decision of Judge Hough, upon that motion, either through inadvertence or oversight, the said Judge failed to take

notice of the fact that theretofore, and on or about November 8, 1915, the defendant had filed his answer to the complaint in the said action in the United States District Court, and before the motion to remand had been decided, or an order made therein.

That the defendant, within the time allowed by law for that purpose, duly appealed to the Appellate Term of the Supreme Court, First Department, from the said judgment of October 26, 1915, entered by the plaintiffs against this defendant, in the City Court of the City of New York, upon the ground that said judgment was a void judgment, and upon the other grounds set forth and referred to in the defendant's brief upon said appeal, and also from the order of Mr. Justice La Fetra of said City Court, dated October 25, 1915.

That said appeal from said judgment and order came on for argument at the December 1915 term of said Appellate Term, and was argued and submitted at such term.

[On margin:] O. K. J. A. McC.

That said Appellate Term thereafter affirmed said order of October 25, 1915, with costs, and dismissed the appeal from said judgment of October 26, 1915, with costs, and that a copy of said order of said Appellate Term was served on defendant, on or about
88 December 14, 1915, together with the plaintiff's Bill of Costs on said appeal, and that a judgment has since been entered therefor, by said plaintiffs.

That thereafter, at said December 1915 term of said Appellate Term, a motion was duly made for leave to appeal from the determination of said Appellate Term, affirming the said order and dismissing the appeal from the judgment aforesaid, to the Appellate Division of the Supreme Court, First Department, upon the ground that important questions of law are involved in said appeal, and important statutes including the statutes of the United States (U. S. Comp. Stat., Secs. 1010 and 1011, Jud. Code, Secs. 28 and 29), above mentioned, as well as said defendant's rights under the Constitution of the United States, 14th Amendment, Section 1, and that the principles involved were and are of importance to others than the parties in litigation in this action, and that the determination of the several issues and questions involved in this case, will affect great public interests and will settle important principles of law, affecting numerous cases, and that as no opinion has been filed by said Appellate Term, that the appellant was without definite knowledge of the particular points of law in said appeal, which were decided or passed upon by said Appellate Term, or whether any important authority or principle of law, applicable to the case, or submitted in support of appellant's contention on said appeal, had been overlooked, or was not properly brought to the attention of the said Appellate Term, and for the other reasons mentioned and set forth in said application to said Appellate Term, to which I beg leave to refer on this motion.

[On margin:] O. K. J. A. McC.

That the said Appellate Term has denied said defendant's motion

for leave to appeal to this Court, as more fully appears from the order of said Appellate Term, dated December 31, 1915, and entered therein and served on the 3rd day of January, 1916.

89 That as deponent verily believes, the said Appellate Term, erroneously determined said appeal, and in dismissing the same, and that it has overlooked or misapprehended certain important principles of law involved in said appeal, as well as certain statutes and laws of the United States, affecting the rights of the defendant, and the protection afforded him under the United States Constitution, 14th Amendment, Section 1, and as hereinafter more fully set forth, and to which deponent begs leave to refer on this motion.

That the following are some of the principal cases and authorities relied upon by the said appellant, and which were cited on said appellant's brief, before said Appellate Term, which deponent now begs leave to submit to this Honorable Court, on the present motion.

The U. S. Constitution, 14th Amendment, Section 1, which reads in part as follows:—

"* * * Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within the jurisdiction, the equal protection of the laws."

U. S. Comp. Stat., Secs. 1010 and 1011; Fed. Jud. Code, Secs. 28 and 29, above set forth.

Kern vs. Huidekoper, 103 U. S., 492.
R. R. Co. vs. Koontz, 104 U. S. 14.
Texas & R. Co. vs. Eastin, 214 U. S. 153.
Donovan vs. Wells, Fargo & Co., 169 F. R. 362.
Buckston vs. Pa. Lumber Co., 221 F. R., p. 725.
Loops vs. Winters Estate, 103 F. R., 362-365.
Flint vs. Coffin et al., 176 F. R. 872.
Noble v. Mass. Ben. Ass'n, 48 F. R. 337.
Clarkson vs. Manson, 4 F. R. 258.

[On margin:] O. K. J. A. McC.

That in the case of Buckston vs. Pa. Lumber Co. (Supra), which held that the United States Court alone had jurisdiction of the action, after its removal from the State Court, we find the

90 following language used in the opinion:—

"It is unthinkable that Congress would provide such an elaborate procedure if it could be of no avail without the consent of the State Court, or until the Supreme Court of the United States had so directed. The right of removal is one conferred by the federal statutes. It is therefore a federal question. An order to remove by the State Court is unnecessary. My attention has been called to no authority holding the contrary. The right of removal is nowise dependent upon the judgment of the State Court. Donovan vs. Wells, Fargo Co., 169 F. 363, 94 C. C. A., 609, 21 L. R. A. (N. S.) 1251."

"The right under the statutes depends on the existence of certain facts. The petition setting up these facts must be accepted as

true by the State Court. If the truth of such allegations of fact is controverted, the issue can be decided by the Federal Court only."

It was also held in the case of Clarkson vs. Manosn (Supra) that in a case similar to the one at bar, where a counterclaim was of an amount in excess of the jurisdictional amount required by the statute, that the defendant may remove the action from the State Court to the United States Court. This case has been followed in a number of later authorities, and has not yet been directly overruled.

See also to the same effect, Block vs. Darling, 140 U. S. 234.

That in the memorandum submitted on behalf of the defendant and appellant upon the motion for leave to appeal, which was made to said Appellate Term, the cases cited on the appellant's brief on the appeal decided herein, were called to the attention of said Appellate Term, and it was also shown and pointed out that the said cases relied upon by the respondents, in support of their contention, were either distinguishable in their principal features from the case at bar, or were otherwise not in point, and the attention of this Court is respectfully called to a few of such cases, viz:—

McKnown vs. Kansas & T. Coal Co., 105 F. 657.

[On margin:] O. K. J. A. McC.

The question in that case arose on a motion which was made in the Federal Court, to remand the action to the State Court,
91 and in the opinion written by him in that case, the District Judge declared that the cases are conflicting, and that because the proposition was too doubtful, he concluded to resolve the doubt in favor of the plaintiff and remanded the action. From a reading of the opinion, it will be seen that nothing else was actually decided and that everything else said by said Judge in the opinion, was obiter dicta.

Moreover, in that case, contrary to the facts in the case at bar, it would appear that the defendant had submitted itself to the jurisdiction of the State Court, by filing an answer and a counterclaim therein, simultaneously with the filing of its petition for removal.

Neither is there any authoritative finding that the state court had continued to retain jurisdiction in that case, while it was actually in the United States Court, and before its remand to the State Court, and Judge Rogers, in his said opinion, admits that where the defendant is compelled to plead a counterclaim, that a contrary rule as to removal, as determined by the counterclaim, may be essential to the ends of justice.

In the case at bar, it was pointed out upon said application, that on account of the limited jurisdiction of the City Court, to the extent of Two Thousand Dollars only, the defendant could not properly plead his counterclaim to the complaint in the action *of* the same remained in the City Court.

In Madisonville Traction Co. vs. St. Bernard Min. Co., 196 U. S. 239, which was one of the cases relied upon by the respondents; it was there held at page 244, near the bottom of the page

"If a case be a removable one, that is, if the suit in its nature b

one of which the Circuit Court can rightfully take jurisdiction, then, upon the filing of the petition in due time, with a sufficient bond, the case is in law removed, and the State Court in which it is pending, will lose jurisdiction to proceed further, and also subsequent proceedings in that Court will be void."

[On margin:] O. K. J. A. McC.

92 That in the case at bar, the petition on the part of the defendant, showed divers citizenship of the parties to the action, and that the amount in controversy exceeded three thousand dollars, exclusive of interest and costs, and the language and averments made, were in strict compliance with the requirements of the federal statutes. That therefore, on the face of the record, the case was removable, and was actually removed from the moment that the petition and bond were filed and accepted in the State Court. And this very case, cited by respondents, was removed from a State Court to a Federal Court, and the Federal Court refused to remand the action to the State Court, but the plaintiffs, however, have taken advantage of certain portions of the language used by the Court, in deciding that case, which had nothing to do with the question then before the Court, and attempted to use the same for that purpose on their brief, upon said appeal.

That the case of Iowa Cen. Railway Co. v. Bacon, 236 U. S. p. 357, also cited by respondents, is not an authority against defendant's position, and is different from the case at bar in very many essential features.

[On margin:] O. K. J. A. McC.

In that case, the petition showed that the amount in controversy was $1,990, whereas the statute required that the amount in controversy must be not less than Two Thousand Dollars, therefore, from the petition itself, it affirmatively appeared that the Federal Court did not have jurisdiction, and that the action was not removable. Moreover, that case was removed by the defendant in 1905, into the Federal Court, and was dismissed in that Court for failure to prosecute the action, and the plaintiff in that action never made any motion to remand the action to the State Court, and never submitted or conceded that the action was removed to the United States Court, but some five years later, the plaintiff moved to amend his pleadings in the action in the State Court, whereupon the defendant made a motion in the State Court to remove the action
93 to the United States Court, without attempting to re-file a petition and bond, as required by the statutes.

The State Court heard the argument on both sides upon the motion in a case which was then in said State Court, and had a right to decide whether the same should be removed or not, as the defendant therein voluntarily submitted itself to the jurisdiction of the State Court and asked for its decision as to the removability of the action. Therefore, under these facts, it does not appear that the plaintiffs could successfully make use of those cases in support of their position on the appeal herein.

LOSE IN CENTER

In the case at bar, on the contrary, the defendant never in any way voluntarily submitted himself to the jurisdicition of the State Court, but the plaintiffs did submit themselves to the jurisdiction of the Federal Court, after the petition and bond for removal to that Court had been filed, and made a motion in the Federal Court to remand the action from that Court to the State Court, thus acknowledging that the action had been removed from the State Court, and was pending at the time in the Federal Court, and that the Federal Court had jurisdicition and authority to remand the action to the State Court.

The judgment caused to be entered by the plaintiffs on October 26, 1915, was rendered by the City Court, between the time of the filing of the petition and bond for removal, and the entry of the order upon the plaintiffs' motion by the United States Court, remanding the action from that court to the State Court.

Neither is the case of Ierney v. Helvetia Swiss F. Ins. Co., 126 A. D. 446, cited by the respondents, directly in point, as the facts in that case are different from those in the case at bar.

[On margin:] O. K. J. A. McC.

In the Tierney case, the defendant submitted itself voluntarily to the jurisdiction of the State Court, where a motion was made
94 by it for an order vacating the removal of the action to the United States Court, which had previously been obtained. Besides, the petition on its face was palpably defective.

In the case at bar, on the other hand, the defendant never submitted himself to the jurisdiction of the City Court, from the time when the petition and bond for removal of the action to the United States District Court was filed by him, according to the United States statutes above mentioned, until after the action had again been remanded to the City Court, by order of Judge Hough of November 16, 1915.

That the attention of this Honorable Court, is respectfully requested to another feature of the case, which may possibly have been overlooked, viz:—That when the United States statutes above referred to, require notice of intention to file the petition and bond for removal, to be given by defendant to the plaintiffs, the obvious and reasonable intent and purpose must be to enable the plaintiffs in the action to make any proper motion; or to take any proper steps in the City Court, with respect to such intended removal. Having failed to do this in the present case, and refusing to avail themselves of the opportunity thus given them, the plaintiffs herein must be held to have waived their right to afterwards appear in the City Court and attempt to have such removal of the action into the United States District Court, in accordance with the provisions of the statutes above mentioned, vacated and set aside, and this failure of the plaintiffs to act therein, under the circumstances, must be regarded as an estoppel against their right to assert the existence of jurisdiction in the said City Court, after the removal of the action from that Court, to the United States District Court, under the aforementioned statutes, and after such notice given to the plaintiffs, as aforesaid.

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That for all of the reasons above set forth, and because important principles of law are involved herein, and important statutes
95 are to be determined, both Federal and State statutes, and also because the rights of the defendant under the Constitution of the United States, and under the statutes aforesaid, are substantially and directly affected and involved, and because his property has been taken and seized without due process of law, and that he has been otherwise injured and damaged, by reason of the acts and conduct of the plaintiffs, and while he was strictly complying with the statutes and laws of the United States, and was within his legal rights, it is now respectfully requested that this Honorable Court grant leave to the defendant and appellant herein to appeal from the determination of said Appellate Term, affirming the order of Mr. Justice La Fetra, dated October 25, 1915, and dismissing the appeal from the said judgment of October 26, 1915, to the Appellate Division of the Supreme Court, First Department, pursuant to the Code of Civil Procedure, and to the rules and practice of this Court.

That except as above set forth, no other or previous application has been made for the relief herein sought for.

E. G. DELANEY.

Sworn to before me this 5th day of January, 1916.

ONA RODER,
Comm. of Deeds, #76, New York City.

Comm. expires Jan. 20, 1916.

[On margin:] O. K. J. A. McC.

96 "A."

At a Stated Term of the United States District Court for the Southern District of New York, Held in the Post Office Building, in the Borough of Manhattan, City of New York, on the 4th Day of November, 1915.

Present: Hon. E. Henry Lacombe, Circuit Judge.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

An order dated the 27th day of October, 1915, having been made herein by Hon. Augustus N. Hand, United States District Judge, upon application of the defendant, by Edward G. Delaney, his attorney, which said order directed the plaintiffs or their attorney, to show cause before this Court on the 29th day of October, 1915, why the said plaintiffs, their attorney or attorneys, agents, and representatives, should not be enjoined and restrained from in any manner proceeding with or prosecuting the above entitled action, wherein Moses Feltenstein and Abraham Rosenstein are plaintiffs, and Bal-

trus S. Yankaus, is defendant, in the City Court of the City of New York, and why any and all proceedings taken or had in said action in said City Court, or any order or orders or judgment entered therein in such City Court since the date of the filing of petition and bond on removal in this action, and since the filing in said District Court of the United States, for the Southern District of New York,

[On margin:] O. K. J. A. McC.

97 on the 20th day of October, 1915, of the certified copy of the record herein, as prescribed by law and the statutes of the United States, should not be vacated, set aside and declared null and ineffectual, and why the defendant herein should not have such other and further order or relief in the premises as might be just and proper; and the motion upon said order to show cause having duly come on to be heard before this Court on the 29th day of October, 1915, and the Court having heard Frank J. Felbel, of counsel for the defendant in support of said motion, and Abraham Rosenstein, one of the plaintiffs in person in opposition thereto, and due deliberation having been had,

Now on reading and filing the said order to show cause, dated October 27, 1915, the affidavit of Edward G. Delaney thereto annexed, verified the 22nd day of October, 1915, and the affidavits of Baltrus S. Yankaus thereto annexed, verified on the 26th and 27th days of October, 1915, respectively, with due proof of service of copies thereof upon Virginius Victor Zipris, attorney for the plaintiffs, and affidavit of Abraham Rosenstein, verified October 29th 1915, and on reading the certified copy of the record in the City Court of the City of New York, being the summons and complaint, notice of removal, the petition for removal duly verified, the affidavit of the attorney for the defendant, and the bond on removal, now on file in this Court, and upon reading the opinion filed on this motion it is, on motion of Edward G. Delaney, attorney for the defendant,

[On margin:] O. K. J. A. McC.

Ordered, that until the further order of this Court, made upon proper notice and motion on the part of the plaintiffs, to remand said cause, and the entry and service of said order thereupon, the said plaintiffs, Moses Feltenstein and Abraham Rosenstein, their attorney or attorneys, agents, servants or representatives, be and they are hereby enjoined and restrained from in any way proceeding

98 with or prosecuting said cause of action in the City Court of the City of New York, or from collecting anything under any judgment entered therein.

Enter.

E. HENRY LACOMBE,
Circuit Judge.

A copy.
T. F. SMITH, *Clerk.*

[Seal City Court of the City of New York.]

[United States internal revenue documentary stamp, series 1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

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9 [Endorsed:] Supreme Court, Appellate Division, First Department. Moses Feltenstein and Abraham Rosenstein, Plaintiffs-respondents, against Baltrus S. Yankaus, Defendant-appellant. Affidavit and notice of motion. Edward G. Delaney, Att'y for defendant-appellant, 154 Nassau Street, Borough of Manhattan, City of New York.

00 Supreme Court, Appellate Division, First Department.

Moses Feltenstein and Abraham Rosenstein, Plaintiffs-Respondents,
against
Baltrus S. Yankaus, Defendant-Appellant.

Appeal from Judgment and Order.

Decided December, 1915, Term, App. T.

City and County of New York, *ss:*

Abraham Rosenstein, being duly sworn, deposes and says: That he is one of the plaintiffs in this action.

This application for leave to appeal involves an order of Mr. Justice La Fetra, of the City Court, which declared and determined that the City Court continue to retain jurisdiction of this case, which was begun in the City Court, and that an attempted removal of this case to the Federal Courts was abortive and that the attempted removal be set aside and that the Court declare that the case was not a removable one and not properly removed to the Federal Court and that the City Court retain jurisdiction. (Printed papers on appeal, Fols. 37 et seq.)

The judgment that was entered directly after the making of that order was entered upon the default of the defendant in failing to appear or plead in the action. (Printed papers, Fols. 33-35). The appeal that the defendant took to the Appellate Term was both from the said judgment and from the said order (Printed papers, fol. 6).

[On margin:] O. K. J. A. McC.

Throughout his moving affidavit the defendant continuously, but always erroneously, refers to the fact that the case had been removed to the Federal courts and that the case was pending in the Federal courts. But these are absolute misstatements and are in no way warranted by the facts, because instantly after filing the pretended petition and bond on removal, plaintiffs took steps to set the same aside and secured the city court's determination that the removal was ineffectual and abortive.

01 The defendant has gone on the assumption that in spite of the City Court's determination, the case was nevertheless in the Federal Courts, and that any application that the plaintiffs had to make should have been made in the Federal Courts. The

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Appellate Term, however, discountenanced such view and has upheld Judge La Fetra by confirming his order.

A sufficient answer to the defendant's contentions is presented in the respondents' printed brief on appeal, which will be submitted herewith. They show this conclusively, viz: That the State Courts, as well as the Federal Courts, have the power to determine the question as to whether a petition and bond on removal are jurisdictionally defective or not, and if it appears jurisdictionally defective, that the Court continue on with the case as though no such papers have been filed. That is the exact holding of the various Federal Courts whose decisions are pointed out in our (respondents') brief as well as the decisions of our own Courts.

The point briefly stated is this: Plaintiffs sued in the City Court to recover $800 on a written contract of retainer for professional services as lawyers and for loans. The City Court had undoubted jurisdiction of such an action. Likewise, the defendant was served within the jurisdiction of the City Court and no question is made that jurisdicition of the person properly attached. What the defendant urges, however, is that prior to his time to answer had expired, he (defendant) had filed a petition and bond in the City Court to remove the case to the Federal Courts. The petition is set forth at length in the printed papers on appeal (fol. 55).

[On margin:] O. K. J. A. McC.

It will be observed from a reading of that petition that the defendant purposely omitted to state the nature of the action and the amount for which plaintiffs sued, but merely asserted that by way of his counterclaim, which he claims to exceed $3,000, that the matter and amount in dispute exceeds $3,000. Nothing is
102 shown to the Court or in his petition as to the nature and amount of plaintiffs' claim, nor is it asserted or even claimed that the defendant had interposed a counterclaim. That is left to conjecture.

That petition, the City Court after a contest in which the defendant participated and opposed, declared abortive, resulting in the entry of the order of Mr. Justice La Fetra before whom the motion was argued by both sides. His written opinion appears in the printed papers (fol. 114).

The City Court correctly decided the question. The Federal Statutes from which the defendant gives copious extracts show that any suit may be removed "of which the District Courts of the United States are given original jurisdiction by this title."

Fed. Judiciary Code, Secs. 28, 29.

The question then comes directly as to what District Courts of the United States are given original jurisdiction. The Federal Statutes answer that the District Courts shall have original jurisdiction of all suits of a civil nature "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * is between citizens of different states."

Fed. Jud. Code (Mch. 3, 1911), Sec. 24.

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So that at the outset the defendant was met with the insuperable objection that the matter in controversy did not exceed $3,000, but involved merely $800.

The further provisions of the Federal Judiciary Code that it is the duty of the State Court to accept the petition and bond and proceed no further in the suit, applies only in such cases where the party is "entitled" to remove the case to the Federal Courts, as provided in Sections 28 and 24 above commented on.

Fed. Judiciary Code, Sec. 29.

[On margin:] O. K. J. A. McC.

We take up now several statements made in the papers on the application, in the order that the defendant sets it forth:

103 It is first asserted that on November 8th, 1915, the defendant filed his answer in the Federal Court, but this took place nearly two weeks after plaintiffs had entered their judgment and after the City Court had declared by its order that the case was never removed and that it still remained in that, the City Court. However, the defendant saw fit to ignore, and in fact repudiate, the City Court's jurisdiction and in spite of that filed his answer in the Federal Courts. He declares that at the time he filed his answer in the Federal Courts the case was still in the Federal Court. This was untrue because the City Court had already declared that it was never removed.

The defendant again insists (fol. 11) that Judge La Fetra made his order after the case had been removed. That begs the question, because the only form of attempted removal was the filing of a jurisdictionally defective petition and bond, which the City Court promptly set aside.

Defendant again asserts (fol. 12) that without any notice to defendant, judgment was entered for the amount demanded in the complaint, with costs. But this occurred after Judge La Fetra had decided that the case was still there, and when the defendant absolutely ignored the Court's jurisdiction, refused to appear, refused to plead, and disclaimed the State Court's jurisdiction. The defendant being in default, judgment was entered against him.

[On margin:] O. K. J. A. McC.

The defendant then asserts (fol. 13) that moneys over $5,000 have been tied up by reason of proceedings taken subsequent to the entry of judgment. This is not so for the reason that the plaintiffs, after the Sheriff had reported that he could find no property, discovered an account in a local banking institution, and served a third party order, and discovering that more than $1,000 was deposited there to defendant's credit, a notice was promptly served both on the attorney for the defendant herein and on the said banking institution, that the bank retain only one thousand dollars by virtue of the third party order.

104 Since entry of the judgment, the defendant's attitude in the State Courts has been one of total disclaimer of its au-

thority and he has disputed every attempt on the part of the State Courts to continue with the jurisdiction of this action, as a result of which these plaintiffs have been compelled to apply to the City Court to direct the defendant to turn over a sum sufficient to pay the judgment, interest and expenses, which he, the defendant, again refused to obey, claiming that the State Court still had no jurisdiction to enter judgment, and whereby plaintiffs were compelled to seek the defendant's punishment for his contempt in defying the Courts as well as the Judges, which application remains undetermined in the City Court.

[On margin:] O. K. J. A. McC.

That shortly after the plaintiffs properly entered their judgment the defendant applied to a Justice of the local Federal Court to restrain and enjoin the plaintiffs from proceeding in the State Courts and to set aside the State Court's proceedings subsequent to the filing of the petition and nullify the judgment, etc. That application these plaintiffs were compelled to defend, and it came on to be heard at the Special Term for motions before Circuit Judge Lacombe, who then sat in the motion part, and there, from the bench, Judge Lacombe expressed his opinion that he could not grant the defendant the relief asked for and that from his knowledge of the cases, there was too much doubt as to the right of a removal upon the ground that a counterclaim exceeded the jurisdictional sum, and he stated that the determination of such question ought to come up properly on a motion to remand, a step which he suggested that the plaintiffs take. The defendant argued before Judge Lacombe on that application that the United States Court was a proper tribunal to determine the question of removal, even if the petition filed in the State Court was fatally defective because jurisdictional facts were not shown. Deponent, while conceding that the Federal Court had equal jurisdiction, urged and argued that the State Courts had concurrent jurisdiction to determine the
105 same question. Judge Lacombe, following out his remarks on the bench, refused to vacate the judgment and order of the State Court, as asked for by defendant, but he stayed plaintiffs from proceeding under the said judgment, until plaintiffs made a motion to remand as he had suggested. His order is attached to the moving papers herein.

After the argument, Judge Lacombe wrote a brief opinion in which he set forth that jurisdiction was too doubtful for the Federal Court to retain jurisdiction and cited his own decision, made about six years before, wherein he had remanded a cause to the State Court because of the doubt in the Federal decisions as to whether a counterclaim could be considered in determining what was "the matter in controversy." (Crane Co. v. Guanica, 132 Fed. 713.)

A reading of Judge Lacombe's opinion, set forth in our printed brief, will convince, that Judge Lacombe made no effort whatever to go any further into the question other than to decide that the questions ought to be thoroughly thrashed out on a motion to remand, as he granted a stay only temporarily until the motion to

remand was made, and his brief opinion indicates that he merely skimmed the surface of the question, leaving it to the application on remand to cover the entire question.

Judge Lacombe's remarks to the effect that this case was there (in the United States Court), was merely obiter, as Judge Lacombe only stayed plaintiffs' proceedings under the judgment with the advice that plaintiffs proceed by a practice which he pointed out. To him was not at all given for adjudication the question as to whether the State Courts have concurrent jurisdiction or otherwise.

[On margin:] O. K. J. A. McC.

Following Judge Lacombe's advice and suggestion that the matter could and should be heard on a motion to remand, where the question of jurisdiction could be squarely brought up, and as well to dissolve Judge Lacombe's stay, deponent promptly made an
106 application in the United States District Court for an order that the case be remanded to the City Court on the grounds above set forth and secured an order to show cause on November 1st, 1915, returnable on November 5th, 1915, based on deponent's affidavit, in which deponent recited briefly such of the above facts as were material to that application. In that application, deponent particularly called to the Court's atention *to* the fact that he was following the suggestion of Judge Lacombe to remand, and throughout his affidavit urged that the case was not one which was entitled to be removed and was not a removable case, and that the plaintiffs sought the Court's relief in order to get free from the temporary stay they had been granted by Judge Lacombe, and in which the plaintiffs herein also urged that they (plaintiffs) had proceeded to judgment under various decisions which allowed the State Court to continue with the case, the case not being one "entitled" to removal because of jurisdictionally fatal defects in the petition.

After due and thorough hearing, Judge Hough, who read the record, rendered an exhaustive opinion. Judge Hough's opinion which passes on the precise petition in question and lays at rest all question as to the sufficiency and jurisdictionally defective petition, is printed at length in our (respondent's) printed brief, submitted herewith. (P. 13.)

The defendant herein recognizing that Judge Hough's opinion entirely put out of question in the Federal Court the sufficiency of the petition, alleges that Judge Hough had inadvertently and through an oversight failed to take notice of the fact that on November 8th, 1915, he (defendant) had filed his answer in the United States Court. But the plaintiffs had already some time before entered their judgment, and the answer filed subsequent to the filing of a petition in the State Court would have no bearing on the subject.

[On margin:] O. K. J. A. McC.

What was up for the Court's determination was whether the case was properly removed at the time the petition and bond were filed.
If it was not, the City Court had a right to continue with the
107 jurisdiction. For what Judge Hough considered and what could only be considered in the case, was as to whether the

petition on removal, which was the lever by which defendant claim
he lifted the case into the United States Court, was jurisdictionall
fatal or not. The Court could not be influenced by any subsequer
process or paper in the matter, and as Judge Hough says, by virtu
of the latest (1887) provisions of the Federal Removal Act, onl
processes before the defendant's pleading can be taken into consider
tion. If the defendant took the chance of filing his answer in th
Federal Courts and ignored absolutely the entry of the judgment i
the State Court, that was a matter of his own look-out. He purposel
ignored and defied the State Courts, and did not even make an
attempt to set aside the judgment entered October 26th, 1915, unt
some time after remand.

After trying to get the Federal Courts to fasten jurisdiction i
the case, but not succeeding, the defendant comes back to the Stat
Courts and continues on with the appeal that he had taken fro
Judge La Fetra's order and from the judgment entered thereafte
The Appellate Term heard argument on the same at the Decembe
Term, and shortly after such argument affirmed the order witho
opinion and dismissed the appeal from the judgment. The Ap
pellate Term has likewise denied defendant's application for leav
to appeal to this Court in spite of vivid statements of violation of co
stitutional and federal rights.

It is claimed that the Appellate Term has overlooked various au
thorities and has incorrectly decided and misapprehended the re
purport of various decisions that both parties submitted to tha
Court for consideration; and the important leading case of Madiso
ville Traction Co. v. St. Bernard Co. (196 U. S. 239) and othe
Federal State cases are attempted to be distinguished, but witho
success, for these very cases have held repeatedly that the State Cou
has power to determine the sufficiency or insufficiency of the que
tions.

[On margin:] O. K. J. A. McC.

108 Since we printed our (respondents') brief on the appeal
the Appellate Term, and which is submitted herewith,
further examination into the cases convincingly proves that th
Appellate Term was wholly correct in its decision. We need mak
no comment on the cases, but to merely cite them to this Court.

Stone v. South Carolina, 117 U. S. 432.
Springer v. Howes, 69 Fed. 849.
Burlington Railway v. Dun, 122 U. S. 513.
Harkvadi v. Vadrey, 172 U. S. 148-160.

But the defendant continues to urge that a counterclaim can b
taken into consideration. Were that even a proper answer, the fa
is that at the time of the filing of the petition and bond in the Cit
Court, no counterclaim had yet been interposed and was never inte
posed in the City Court. While in such papers he has evinced
desire or intention to interpose a counterclaim, he was not bound
interpose it and could have interposed a plain general denial if th
case came to the Federal Court.

Our (respondents') printed brief on the appeal exhaustively pr

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sents the decisions which have held both ways, but it will be observed that there is not one case cited by the appellant subsequent to the Federal 1887-8 Removal Acts, which held directly that a removal can be effected merely on a controversy created by a counterclaim.

[On margin:] O. K. J. A. McC.

It may be noted that by the 1887-1888 remodeling of the Federal Removal Act, two new provisions were inserted which differentiated that act from the prior ones and made a revolutionary change in the practice on removal. The first change was that the applicant for a removal was declared to be defendant and he required to apply for removal before his time to plead or move in the State Court expires. The other change is the statement in the act that the case to be removed must be one of which the District Courts of the
109 United States have original jurisdiction. So that if prior to the Amendment of 1887 there were decisions which held that the counterclaim must be taken into consideration under certain circumstances, those decisions were completely nullified by the 1887-1888 Amendment. If there are any decisions subsequent to 1887 (and we do not remember finding any) then such decisions were based on decisions made prior to 1887 without giving due or perhaps any consideration to the important change made in 1887-1888. In addition to cases cited in our printed brief, the Supreme Court of the United States has indicated by various decisions that it is only the allegations of the complaint which can be considered on the application to remove and that only such pleadings or matter set forth in the petition occurring prior to the filing of the petition, can be considered and not any subsequent occurrence in the matter. In one case for instance, Chief Justice Fuller says:

"The general policy of the Act of March, 1887, as is apparent on its face and has been repeatedly recognized by this Court, was to contract the jurisdiction of the circuit Courts. Those cases and those only were made removable under Section 2, in respect of which original jurisdiction was given to the Circuit Courts by Section 1. Hence it has been settled that a case cannot be removed from a State Court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in subsequent pleadings. And moreover that jurisdiction is not inferred by the allegation that defendant intends to assert a defence based on the Constitution, or a law or treaty of the United States, or under statutes of the United States, or of a State in conflict with the Constitution."

Arkansas v. Kansas Coal Co., 183 U. S. 115.

[On margin:] O. K. J. A. McC.

Later, in commenting on and quoting from the Arkansas case, Judge Peckham says:

"The test of the right of removal is that the case must be one which the Circuit Courts might have exercised original jurisdiction

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under Sec. 1 of the Act of March 3, 1887, as corrected by Act
Aug. 13, 1888. The cases hold that to give the Circuit Court origin
jurisdiction the Federal question must appear necessarily i
110 the statement of plaintiff's cause of action, and not as me
allegations of the defense which the defendants set up
which they rely upon. 3rd St. Ry. Co. v. Lewis, 173 U. S. 457."
Boston — & Mining Co. v. Montana Ore Co. 188 U. S. 632,
p. 640.

To the same effect see:
Eisele v. Oddie, 128 Fed. 941.
Hayne v. Wolley, 180 Fed. 573.
Bailey v. Wooly, 183 Fed. 1021.

The Clarkson v. Manson case, concerning which the defendan
makes so much, has been explained and commented on fully in ou
printed brief (page 23), and we need make no further comment.

The defendant makes the misstatement to this Court that th
plaintiffs submitted themselves to the jurisdiction of the Federa
Court after the filing of petition and bond on removal and made
motion to remand, thereby acknowledging that the case was in th
Federal Courts (fol. 34). From the statements contained above, i
is shown that it was the defendant herein who forced the plaintiff
to combat a motion that the defendant instituted to the Federa
Court for a stay and to set aside the entire proceedings. We do no
understand that plaintiffs' defending their rights and presenting
the facts to the Federal Court amounts to a consent to jurisdiction
nor do we understand that following the suggestion of Judge
Lacombe to seek a remand of the case, in order to get clear of the
temporary stay that Judge Lacombe had granted, would have the
effect of a consent to jurisdiction.

Tierney v. Helvetia Swiss F. Ins. Co., 127 App. Div. 416;
110 Sup. 613.
Crane Co. v. Guanica Centrale, 132 Fed. 713.
Olde Wagon Works v. Benedict, 67 Fed. 1.

[On margin:] O. K. J. A. McC.

In fact, the plaintiffs herein were compelled to prosecute an appli-
cation to remand in the Federal Court not only to secure freedom
from the temporary stay granted by Judge Lacombe, but as respect-
able authorities hold, if the plaintiffs herein had failed to in-
111 stitute such proceedings to remand, it would have been con-
sidered a waiver of all the objections to the removal.
Todd v. Cleveland M. R. R. Co., 65 Fed. 145.

But again asserts the defendant in his affidavit (fol. 37), the
Federal Act requires notice of petition and bond for removal be
given, and that as he gave some notice the plaintiffs should have
taken steps with respect to such intended removal, and having failed
to do so they waived their right to afterwards appear in the City
Court and attempt to have the removal set aside, and that therefore

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the plaintiffs had been estopped to assert the continued jurisdiction of the City Court.

These statements are very naively presented to this Court, for all the notice that defendant gave before filing his petition and bond was a notice served October 15th, 1915, to the effect that he annexed a copy of the petition and bond, which he would file in the office of the Clerk of the City Court on October 16th, 1915. The Record on Appeal shows this notice. (Printed case, fol. 85.) No time and place is given when plaintiffs could have their opportunity to oppose defendant's move.

Of course, it is absurd to claim that this was a notification which in any form or manner could be opposed, or that the plaintiffs could have in any way prevented the filing of such papers. After the defendant herein filed such papers, and which he stated had the effect instanter to remove the case to the Federal Court, the plaintiffs herein took the only step that was open to them, viz.: to secure the City Court's ruling that the attempted removal be set aside, and that the Court determine that the action was not a removable one and declare that the action had not been removed to the United States Court, and that the City Court continue to retain its jurisdiction as though such removal had not been attempted or made. Deponent made such application returnable in the City Court at Special Term, and the defendant herein appeared, interposed affidavits and argued against the application in an effort to sustain the removal.

[On margin:] O. K. J. A. McC.

112 The defendant finally states that there are important principles of law and fact involved concerning Federal State Statutes, the Federal Constitution and other matters, and that he would be deprived of his property, etc. (fol. 39). These, while high-sounding, do not even disclose the defiant and continued contemptuous attitude this defendant has displayed to the State Courts and their jurisdiction. While he has opposed every application that has been made and has himself made numerous applications in the State Courts, he has made every possible move that could be made to prevent the plaintiffs from collecting their judgment. He has been several times offered an opportunity by the plaintiff to open the default and try out the issues if he had any to try, but the defendant persistently refused to accept the offer of deponent as well as the Court to come in and defend the action. His position certainly does not warrant any sympathy. No important questions are involved for the numerous cases cited in our (respondents') printed brief and the additional ones shown above, indicate clearly that the questions have been thrashed out numberless times in the Federal and in the State Courts and that no possible interest can be served by again reviewing the question.

In further defiance of the State Court's jurisdiction this defendant has in fact instituted an independent action in the United States Court, for the Eastern District, against these plaintiffs, wherein he seeks in an equity suit to nullify and invalidate the very judgment in question on the precise grounds that he now seeks to secure this

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court's permission to appeal; and process in that matter has bee
served upon the plaintiffs herein about a week or ten days ago, so it i
very evident that the defendant herein is attempting to play fast an
loose with both Federal and State courts in the see-saw fashion tha
he has been conduction his defence from the very beginning
113 It is therefore submitted that this application should be de
nied with costs.

ABRAHAM ROSENSTEIN.

Sworn to before me this 22 day of January, 1916.
CHARLES SOMBERG,
Com. of Deeds, N. Y. City.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series o
1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

114 [Endorsed:] Supreme Court, Appellate Division, Firs
Department. Moses Feltenstein and Abraham Rosenstein
Plaintiff's-resp'd'ts, against Baltrus S. Yankaus, Defendant app'l't
Affidavit in Opposition. Virginus Victor Zipris, Attorney for plain
tiffs, 309 Broadway, Borough of Manhattan, City of New York.

115 Supreme Court, Appellate Division, First Department.

21.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Resp'ts,
vs.
BALTRUS S. YANKAUS, App'l't.

Order on Application for Leave to Appeal from Appellate Term.

An application having been made by the defendant to a Justic
of the Appellate Division of the First Judicial Department for leav
to appeal to the Appellate Division from the determination of th
Appellate Term of the Supreme Court in this action entered in th
office of the Clerk of the Supreme Court on or about the — day o
—— 1915, and the said application having come on to be heard, o
reading and filing the notice of application herein, and the affidavi
of Edward G. Delaney in support of said application, and the affi
davit of Abraham Rosenstein in opposition thereto and after hearin
Mr. Edward G. Delaney for the application, and Mr. Abraham
Rosenstein opposed,

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It is ordered that said application be and the same hereby is denied with $10 costs.

Dated, New York, January 28, 1916.

JOHN PROCTOR CLARKE.

A copy.
WM. F. SCHNEIDER, *Clerk.*

[Seal of Court.]

Int. Rev. St.

A copy.
T. F. SMITH, *Clerk.*

[Seal City Court of the City of New York.]

[On margin:] O. K. J. A. Mc.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

116 SIR: Please take notice that the within is a true copy of an order duly made and entered in the within entitled action and filed in the office of the Clerk of Supreme Court, N. Y. Co. on the 28 day of January, 1916.

Dated, New York, Jan. 28, 1916.

Yours, &c.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Pl'ff.

Office and P. O. Address, 309 Broadway, Borough of Manhattan, New York City.

To Edward G. Delaney, Esq., Attorney for Def't.

[Endorsed:] County Clerk's File No. —. Year 191–. Supreme Court, Appellate Division, 1st Department. Moses Feltenstein & Abraham Rosenstein, Resp'ts, vs. Baltrus S. Yaukaus, App'l't. Order on application for leave to appeal from appellate term. (21.) Virginius Victor Zipris, Attorney for pl'ff, Office and Post Office Address, 309 Broadway, Borough of Manhattan, New York City.

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117 At a Stated Term of the United States District Court for th Southern District of New York, held in the Post-offic Building, in the Borough of Manhattan, City of New York, on th 4th day of November, 1915.

Present: Hon. E. Henry Lacombe, Circuit Judge.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

[On margin:] O. K. J. A. McC.

An order dated the 27th day of October, 1915, having been made herein by Hon. Augustus N. Hand, United States District Judge upon application of the defendant, by Edward G. Delaney, his attorney, which said order directed the plaintiffs or their attorney, to show cause before this Court on the 29th day of October, 1915, why the said plaintiffs, their attorney or attorneys, agents and representatives should not be enjoined and restrained from in any manner proceeding with or prosecuting the above entitled action, wherein Moses Feltenstein and Abraham Rosenstein are plaintiffs, and Baltrus S. Yaukaus is defendant, in the City Court of the City of New York and why any and all proceedings taken or had in said action in said City Court, or any order or orders or judgment entered therein in such City Court, since the date of the filing of petition and bond on removal in this action, and since the filing in said District Court of the United States, for the Southern District of New York, on the 20th day of October, 1915, of the certified copy of the record herein, as prescribed by law and the statutes of the United States, should
118 not be vacated, set aside and declared null and ineffectual, and why the defendant herein should not have such other and further order or relief in the premises as might be just and proper and the motion upon said order to show cause having duly come on to be heard before this Court on the 29th day of October, 1915, and the Court having heard Frank J. Felbel, of counsel for the defendant in support of said motion, and Abraham Rosenstein, one of the plaintiffs in person in opposition thereto, and due deliberation having been had,

Now on reading and filing the said order to show cause, dated October 27th, 1915, the affidavit of Edward G. Delaney, thereto annexed, verified the 22nd day of October, 1915, and the affidavits of Baltrus S. Yankaus, thereto annexed, verified on the 26th and 27th days of October, 1915, respectively, with due proof of service of copies thereof upon Virginius Victor Zipris, attorney for the plaintiffs, and affidavit of Abraham Rosenstein, verified October 29th, 1915, and on reading the certified copy of the record in the City Court of the City of New York, being the summons and complaint, notice of removal, the petition for removal duly verified, the affidavit of the attorney for the defendant, and the bond on removal, now on file in this Court, and upon reading the opinion filed on this motion,

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it is, on motion of Edward G. Delaney, attorney for the defendant,

Ordered, that until the further order of this Court, made upon proper notice and motion on the part of the plaintiffs, to remand said cause, and the entry and service of said order thereupon, the said plaintiffs, Moses Feltenstein and Abraham Rosenstein, their attorney or attorneys, agents, servants or representatives, be and they are hereby enjoined and restrained from in any way proceeding with or prosecuting said cause of action in the City Court of the City of New York, or from collecting anything under any judgment entered therein.

[Seal City Court of the City of New York.]

[Seal of U. S. Court.]

E. HENRY LACOMBE,
Circuit Judge.

[On margin:] O. K. J. A. McC.

A true copy.
ALEX. GILCHRIST, JR., *Clerk.*

A copy.
T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled Feb. 26, '16. City Court, New York.]

(Rev. St.)

119 [Endorsed:] United States District Court, Southern District of New York. Moses Feltenstein and Abraham Rosenstein, Plaintiffs, against Baltrus S. Yankaus, Defendant. (Copy.) Cert. Copy. Order. Edward G. Delaney, Attorney for defendant, 154 Nassau Street, Borough of Manhattan, City of New York.

120 At a Stated Term of the United States District Court for the Southern District of New York, held in *and for* the General Post-office Building, Borough of Manhattan, City of New York, on the 16 day of November, 1915.

Present: Hon. Charles M. Hough, Circuit Judge.

L. 14—298.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

Upon reading and filing the order to show cause herein issued by Hon. Charles M. Hough, dated November 1, 1915, and the affidavit of Abraham Rosenstein, one of the plaintiffs in this action, verified November 1, 1915, and the affidavit of Baltrus S. Yankaus, verified

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the 5th day of November, 1915, and after reading the certified copy of the record on removal herein from the City Court of the City of New York, including the petition of removal herein, and on all the proceedings heretofore had herein, and upon reading the opinion filed on this motion herein,

Now, after hearing Abraham Rosenstein, Esq., one of the plaintiffs, in support of the motion, and Horace D. Byrnes, Esq., of counsel for the defendant, in opposition thereto, it is

Ordered, that the above entitled action be and the same hereby is remanded and returned to the said City Court of the City of New York, and that plaintiffs have twenty ($20) Dollars, costs, of this motion and that judgment for that sum be entered by the Clerk.

Dated New York, November 15, 1915.

[Seal City Court of the City of New York.]

[Seal of U. S. Ct.]

C. M. HOUGH,
U. S. D. J.

[On margin:] O. K. J. A. McC.

A true copy.

ALEX. GILCHRIST, JR., *Clerk.*

A copy.

T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled Feb. 26, '16. City Court, New York.]

Rev. St.

121 SIR: Please take notice that the within is a true copy of an order duly made and entered in the within entitled action, and filed in the office of the Clerk of the within named Court at his office P. O. Building in the City of New York, Borough of Manhattan, the 16th day of Nov. 1915.

Dated, N. Y., Nov. 16, 1915.

Yours, etc.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Plff.

Office and Post Office Address, 309 Broadway, Borough of Manhattan, New York City.

To Edward G. Delaney, Esq., Attorney for Def't.

[Endorsed:] United States District Court. Feltenstein & Rosenstein, Plaintiffs, against B. Yankaus, Defendant. (Copy.) Cert. Copy. Order and Notice of Entry. Virginius Victor Zipris, Attorney for plff., 309 Broadway, Borough of Manhattan, New York City.

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122 City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

Upon the annexed affidavit of Baltrus S. Yankaus, verified the 29th day of November, 1915; upon the judgment roll filed herein, on or about the 26th day of October, 1915, and upon all the papers and proceedings herein,

Let the plaintiffs, Moses Feltenstein and Abraham Rosenstein, or their attorney, show cause, at Special Term, Part 1, of this Court, to be held at the Court House, No. 32 Chambers Street, in the Borough of Manhattan, City of New York, on the 3rd day of December, 1915, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the judgment entered herein, in favor of the plaintiffs and against the defendant, for the sum of $882.78, on the 26th day of October, 1915, and the execution, and all proceedings thereunder, should not be vacated and set aside upon the following grounds, to wit:—

1. That at or about the time of the rendition and entry of the said judgment, there was no action or cause of action or proceeding pending in said City Court, in favor of the plaintiffs and against the defendant.

2. That on or about the said 26th day of October, 1915, the said City Court had no jurisdiction over the subject matter of said alleged action or cause of action.

[On margin:] O. K. J. A. McC.

123 3. That on or about said last mentioned date, the said City Court had no jurisdiction over this defendant, as the defendant in said action, or in any action or proceedings.

4. That said judgment was obtained by plaintiffs against the defendant in an action which was the only action pending at that time between the parties to the knowledge of the plaintiffs, and, that at the time such judgment was rendered, said action was in the United States District Court for the Southern District of New York and that no action was then pending in the City Court of the City of New York by the said plaintiffs against the defendant.

5. That the rendition of said judgment in said City Court, against the defendant herein, on the date aforesaid, was contrary to and in violation of the Statutes and Laws of the United States, U. S. Comp. Stat. Sections 1010 and 1011 (Jud. Code, Sec. 28 and 29).

6. That the rendition of said judgment in the said City Court, and any attempted enforcement thereof, against this defendant and the seizure of defendant's property under execution or in proceedings supplementary to execution, or otherwise, under said judgment, constitute a taking of the property of the defendant, without due process of law, and is in violation of his rights under the Con-

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stitution of the United States, more especially the 14th Amendment, Section 1 thereof.

7. That the rendition of said judgment against the defendant, at the time and in the manner aforesaid, was and is an invasion of said defendant's civil rights under the said Constitution and Laws of the United States.

[On margin:] O. K. J. A. McC.

And why the execution and all other proceedings or orders taken and made or had, or attempted to be taken, under said judgment should not also be vacated and set aside, and why the prop-
124 erty of the defendant should not be released and discharged from *ar* by virtue of any alleged lien or claim thereunder; and why said defendant should not have such other and further relief in the premises, as may be just and proper.

And it is further ordered, that until the hearing and decision of this motion, and the entry and service of an order thereon, all proceedings on the part of the plaintiff on their attorney above named, and of the Sheriff of the County of New York, be and they hereby are stayed.

Service of a copy of this order on or before the 1st day of December, 1915, shall be deemed good and sufficient service thereof.

Dated, New York, November 30th 1915.

JOHN V. McAVOY,
Justice of the City Court of the City of New York.

A copy.

[Seal City Court of the City of New York.]

THOMAS F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled F. 10, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

125 City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiff-, against
BALTRUS S. YANKAUS, Defendant.

STATE OF NEW YORK,
County of New York, City of New York, ss:

Baltrus S. Yankaus, being duly sworn, deposes and says:—

I am the defendant in the above entitled action.

Said action was commenced by the service of a summons and complaint upon me, as defendant, on the 11th day of October, 1915.

My time to appear or answer or plead in the said action did not expire until the 18th day of October, 1915, the 17th day of Oc-

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tober, 1915, preceding, being the last day for that purpose, falling on Sunday.

[On margin:] O. K. J. A. McC.

On October 16, 1915, a Petition and proper Bond for Removal of said action from the City Court of the City of New York, to the United States District Court, Southern District of New York, was duly filed in this Court, and due notice in writing that the same would be so filed was given to the plaintiffs and their attorney, on October 15, 1915, pursuant to the Statutes and Laws of the United States, and the United States Compiled Statutes, Sections
126 1010 and 1011, being Sections 28 and 29 of the Federal Judicial Code, governing such cases, and which read in part as follows:—

"Any suit of a civil nature, at law or in equity, *equity*, arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought in any State Court may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. * * * And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district. * * *

U. S. Comp. Stat., Sec. 1011 (Judicial Code, Section 29) provides:—

"Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such State Court, at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit.

[On margin:] O. K. J. A. McC.

Written notice of said petition and bond for removal shall be

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given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

127 On October 20th, 1915, a certified copy of the record upon such removal was duly filed in the Clerk's office of said United States District Court, for the Southern District of New York, pursuant to law and the United States Statutes aforesaid.

That said action thereby and thereafter became and was pending in the said United States District Court, Southern District of New York, within the jurisdiction of said Court, and was no longer in the said City Court, nor within or subject to its jurisdiction, from the said 16th day of October 1915, until on or about the 16th day of November, 1915, the date of the entry of an order in said United States District Court, Southern District of New York, made by Hon. Charles M. Hough, United States District Judge, upon a motion to remand said cause from said last named Court to the said City Court, from which Court the action had theretofore been removed as aforesaid.

That the grounds urged for the removal of said action from the said City Court of the City of New York, to said District Court of the United States, for the Southern District of New York, were as follows:

[On margin:] O. K. J. A. McC.

That the action above mentioned was an action at law and one of which the said United States District Court had original jurisdiction; that the amount in controversy in said action, exceeded the sum or value of Three Thousand ($3,000) Dollars, by reason of a counterclaim of the defendant in that action, which exceeded the sum of Three Thousand ($3,000) Dollars, exclusive of interest and costs, and over and above the amount of said plaintiffs' claim in said action, and by reason of the fact that at the time of the commencement of said action, the plaintiffs were, as they now are, citizens and residents of the State of New York and County of New York,

128 and within the jurisdiction of the District Court of the United States, for the Southern District of New York, and that the defendant in that action, this deponent, at the time of the commencement thereof, was a citizen and resident of the State of New Jersey, as more fully set forth in said petition on removal, filed in said City Court as aforesaid.

Deponent calls attention to the clause in the United States Statute above cited, which reads as follows:

"It shall then (upon the filing of the petition and bond for removal) be the duty of the State Court to accept said petition and bond and proceed no further in such suit."

That the defendant's time to plead, answer or demur to the complaint in said action, removed to the United States District Court,

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Southern District of New York, as aforesaid, did not expire until thirty (30) days after the said 20th day of October, 1915, the date of the filing of the Record of Removal therein That before the expiration of said time, and on or about the 8th day of November, 1915, the answer to said complaint was duly filed in the said action in said United States District Court, Southern District of New York.

[On margin:] O. K. J. A. McC.

That notwithstanding the removal of said action to the United States District Court, for the Southern District of New York, as aforesaid, and while said action was properly and lawfully in the last said mentioned Court, the plaintiffs, on or about the 26th day of October, 1915, entered a judgment in the said City Court, in favor of the said plaintiffs and against this defendant, for the sum of $882.78. That thereafter, and while said *said* suit was still pending in the said United States District Court, the plaintiffs issued execution to the Sheriff of New York County, upon said judgment, against the property of said defendant, and in proceedings supple-
129 mentary to execution thereunder, seized or attached certain property of this defendant, consisting of moneys on deposit to the credit of defendant in the Equitable Trust Company of New York, amounting to the sum of about $5,102, and that $100 thereof has been held in such proceedings, to satisfy the said judgment of plaintiffs, recovered as aforesaid.

That subsequent to the filing of said petition and bond for removal, on the said 16th day of October, 1915, the plaintiffs made a motion, in the said City Court to vacate and set aside said petition and bond for removal and that the said City Court retain jurisdiction of the action, as more fully appears from the said motion papers, now on file in this Court.

That on the 25th day of October, 1915, an order upon said motion was made by Mr. Justice La Fetra, who heard the same, granting said motion and declaring that the said City Court had and did retain jurisdiction of the action. That thereafter and on the 26th day of October, 1915, the said plaintiffs entered a judgment in this court against the defendant for the sum of $882.78, without notice of any kind to this defendant, and after the removal of the action to the District Court of the United States, for the Southern District of New York, as above mentioned.

That thereafter, a motion was made, upon an order to show cause, in the District Court of the United States, for the Southern District of New York, by the defendant in said action, in said United States Court, to restrain and enjoin the plaintiffs from proceeding or attempting to proceed with said alleged action in the City Court, or from taking any steps therein, or enforce the judgment rendered in said Court as above mentioned.

[On margin:] O. K. J. A. McC.

That said motion to enjoin said plaintiffs in the said City
130 Court came on before and was heard on October 29, 1915, by Hon. E. Henry Lacombe, United States Circuit Judge, who

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rendered his decision thereupon, in which he held and decided that the said action, removed as aforesaid from the said City Court, was then and had been in said United States District Court, until the same should be remanded, on proper motion to be made therefor to the said City Court, as provided by law and the U. S. Comp. Stat. aforesaid.

In his opinion, granting the injunction order, Mr. Justice Lacombe, among other things, stated:

"Plaintiffs' proper course would have been to make a motion to remand; this he may now do. When such motion is made and granted, the cause may proceed there; it is now here. Plaintiffs are enjoined until remand is made from proceeding further in the State Court."

[On margin:] O. K. J. A. McC.

That thereafter, following out the necessary practice pointed out in the said decision of Judge Lacombe, the plaintiffs moved in said United States District Court, for the Southern District of New York, to remand the said action from that Court to the City Court of the City of New York, as more fully appears from the plaintiffs' motion papers therein, to which I beg leave to refer on this motion. That said motion to remand came on before Hon Charles M. Hough, United States District Judge, and after the same had been heard by him and was duly submitted he rendered his decision on said motion to remand and granted the said motion of the plaintiffs therefore. That on or about the 16th day of November, 1915, an order was made by Judge Hough, remanding the said action from the United States District Court, Southern District of New York, to the said City Court from where it had theretofore been removed, as more particularly appears from the said order on file in said action, and to which I beg leave to refer on this motion.

131–133 That after the removal of said action into the United States District Court, for the Southern District of New York, and on or about the 8th day of November, 1915, and before the time of the defendant to answer, plead, or demur, to the complaint in the said action had expired, and before said action had been remanded to said City Court, said defendant duly filed his answer to the complaint in the said action in the United States District Court Southern District of New York, to which deponent begs leave to refer on this motion.

That since the filing of said petition and bond for removal, on the 16th day of October, 1915, and the filing in the District Court of the United States, for the Southern District of New York, on the 20th day of October, 1915, of the Record of Removal, of said action, as provided by law, no proceedings of any kind other than an appeal from said judgment so taken by plaintiffs, on or about October 26, 1915, and from the order of Mr. Justice La Fetra, herein referred to, were taken by or on behalf of the defendant in the said City Court of the City of New York; and that any steps or motions or proceedings heretofore taken by defendant in said action, were taken and instituted in the District Court of the United States, for the Southern

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District of New York, as provided by law, and the aforesaid. U. S. Comp. Stat.

That since the entry by them of said judgment, the plaintiffs also made a motion in this court, in proceedings supplementary to execution taken under the said judgment, for an order directing this deponent, as the defendant and judgment debtor therein, to turn over and pay to the Sheriff of the County of New York, the sum of $882.78, the amount of the said judgment recovered as aforesaid by plaintiffs together with interest and costs, and the said
134 Sheriff's fees, and the further sum of Thirty ($30.00) Dollars, costs on such supplementary proceedings, allowed to the plaintiffs on the said motion, the said several amounts to be paid out of the sum of One Thousand ($1,000) Dollars the property of this deponent, now on deposit and to his account with The Equitable Trust Company of this City, and which said sum of $1,000 has already been held or attached and seized under the third party order in supplementary proceedings herein, and which said judgment, interest, sheriff's fees and costs as aforesaid, are required to be paid within three days, or otherwise that a Surety Company Bond be given by this deponent, in lieu thereof, pending an appeal now being taken herein by the defendant to the Appellate Term of the Supreme Court, First Department.

That a proposed order, upon said last mentioned motion of the plaintiffs has been served on this deponent, at his office, with notice of settlement thereof, for November 29, 1915, but the same has not yet been signed.

[On margin:] O. K. J. A. McC.

That this defendant's rights under the Constitution of the United States, Fourteenth Amendment, Section 1, have been violated and invaded by the action and conduct of the plaintiffs, in procuring and causing to be entered the said judgment against defendant, under the circumstances above set forth and while the said action was in the United States District Court, for the Southern District of New York, and also in proceeding to enforce said judgment by execution and otherwise, as before stated, and in unlawfully taking and seizing the property of said defendant thereunder; and that all of the same is an invasion of defendant's civil rights and is without due process of law. That as more fully appears from the answer of the defendant, duly filed in said action, the defendant then had, and now has a good and substantial defense upon the merits to the said al-
135 leged cause of action of the plaintiffs, and that the said answer and defense duly filed by defendant, on November 8, 1915, as aforesaid was interposed in good faith, and within the time allowed by law, and thereby tendered an issue in the said action which could only be properly determined by a regular trial of said action, according to law.

That for all of the reasons and upon the grounds aforesaid, this deponent prays that the said judgment for $882.78, obtained and entered on October 26, 1915, as aforesaid, by the plaintiffs in this Court, be vacated and set aside, and that the execution and all other

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orders or proceedings under said judgment, and for the enforceme and collection thereof, be also vacated and set aside, and that the sa property of this defendant be released and discharged from any leged lien or claim by reason of said judgment; and that an ord to show cause, with stay of proceedings in the meantime, instead the usual notice of motion, is also for the same reason now asked herein.

That no previous application has been made for this order.

BALTRUS S. YANKAUS.

Sworn to before me this 30th day of November, 1915.

ONA RODER,
Comm'r of Deeds, #176, New York City.

Comm. expires Jan. 20, 1916.

A copy.
THOMAS F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series 1914, ten cents, canceled F. 10, '16. City Court, New York.]

[On margin:] Q. K. J. A. McC.

136 [Endorsed:] 11909/1915. City Court of the City of Ne York. Moses Feltenstein and Abraham Rosenstein, Plai tiffs, against Baltrus S. Yankaus, Defendant. Copy. Affidavit a order to show cause, with stay, etc. Edward C. Delaney, Attorn for defendant, 154 Nassau Street, Borough of Manhattan, City New York.

137 City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Abraham Rosenstein, being duly sworn, deposes and says: Th he is one of the plaintiffs in this action. That this action was begu in this Court by service of a summons and complaint on the defen ant on or about October 11th 1915, and was brought to recover th sum of Eight hundred ($800) Dollars, Five hundred ($500) Do lars of which was on a special retainer under a written agreeme and Three hundred ($300) Dollars in two separate loans, each such items being separately alleged under a different cause of actio That the defendant's time to answer expired on October 17th 191

On October 15th 1915, defendant served notice to the effect th a petition and bond for removal of this cause from this Court t the District Court of the United States for the Southern District o

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New York, would be filed with the Clerk of the said City Court on October 16th 1915.

[On margin:] O. K. J. A. McC.

That in his said petition, defendant apparently with purpose, omitted to allege the nature of the complaint or the amount therein involved, and he merely stated, that by way of counterclaim, which he asserted "did exceed the sum of $3,000 inclusive of in-
138 terest and costs" and which he claimed to be due and owing from the plaintiffs, was the matter and amount in dispute and that he, the defendant, at the commencement of this action, was a resident of the State of New Jersey and that the plaintiffs were residents of the State of New York, thus making a diversity of citizenship for which a removal was demanded. The defendant at that time had an office for the transaction of business in the Borough of Manhattan, City of New York. The defendant secured no formal order of this Court directing the removal of this cause, simply relying on the Statutes of the United States, which removes the case to the Federal Courts, provided that the applicant was "entitled" thereto. The plaintiffs being convinced that the petition and the record constituted by the said complaint, petition and bond failed wholly to show the jurisdictional facts which entitled the defendant to removal, made an application to this Court to set aside the alleged removal and that this Court retain its jurisdiction of this action as though no removal was had or made.

[On margin:] O. K. J. A. McC.

That the said motion was heard before Mr. Justice La Fetra of this Court, and by an order made about October 25th 1915, he granted the relief requested by the plaintiffs, set aside the said bond and the alleged removal, declared that this Court retain jurisdiction of the action and that the said petition be rejected and that this cause be declared one not properly removable to the Federal Court. The said Justice handed down a written opinion prior to making the order in which he expressly determines that the counter-
139 claim (even had one been interposed) was no guide for determining the amount in controversy, but that the amount claimed in the complaint only could be considered.

After the entry of such order and about October 26th 1915, the defendant having up to that time failed to plead or move herein, a judgment was entered by default in favor of the plaintiffs and against the defendant, for about $880 including costs, and issued execution to the Sheriff of the County of New York, who reported that he could find no property on which he could levy. Plaintiffs however discovered an indebtedness or account that the defendant had at the Equitable Trust Company, and secured from the Chief Justice of this Court, the customary third party order on such company, and it was discovered that the defendant had on deposit a sum exceeding $5,000. That before plaintiffs could proceed to collect the monies so found, defendant's attorney, about October 27th

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1915, secured an order from District Judge Hand of the Distri
Court of the United States, for the Southern District, returnable O
tober 20th 1915, wherein the defendant demanded relief that th
plaintiffs be enjoined from proceeding or prosecuting this actio
in this Court and that all proceedings taken or had in this actio
as well as any orders or judgments entered herein, since the tim
defendant filed his petition and bond on October 16th, should b
vacated and set aside and declared null and ineffectual and for oth
and further relief.

[On margin:] O. K. J. A. McC.

Said motion was argued before Judge Lacombe and after hearin
the parties and expressing from the bench his inability to set asi
any proceedings taken under the judgment, made an ord
140 on November 4th 1915, that the plaintiffs be enjoined fro
proceeding with this case or from collecting anything und
the aforesaid judgment "until the further order of this Court (U
S.) made upon proper notice of motion on the part of the plaintif
to remand said case and the entry and the service of the said ord
thereupon," the defendant's Counsel having argued that the sai
United States District Court had power to deal with this case therei
even if the petition and record sent there, on its face showed, th
it was jurisdictionally defective.

Before making the said order, Judge Lacombe wrote the followi
opinion:

"Jurisdiction is too doubtful to warrant this Court in retainin
the cause. Crane Co. v. Guanics Centrale, 132 F. R. 713. Plai
tiff's proper course would have been to make a motion to reman
This he may now do. When such motion is made and grante
the cause may proceed there; it is now here. Plaintiffs in the mea
while may be enjoined (until remand is made) from proceedi
further in the State Court.

October 30, 1915.

E. S. LACOMBE,
U. S. C. J."

After receiving the said order of Judge Lacombe and on Novemb
5th 1915, the defendant served upon deponent a notice of appe
from this Court to the Appellate Term from the said order of Jud
La Fetra as well as from the judgment entered in this Court in plai
tiff's favor.

On that appeal will come up the precise questions now urged
this motion and in fact a brief has already been interposed by t
defendant appellant and served upon deponent in which are rais
the very questions as to the sufficiency of this Court's right to ha
continued with the suit after the filing of the petition on remov

[On margin:] O. K. J. A. McC.

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In view of the fact that Judge La Fetra, has by his order,
141 and after due deliberation decided that this Court had jurisdiction and had a right to continue with the suit. this application in effect, is an application to review or reverse the order of Judge La Fetra.

After service of said order of Judge Lacombe, deponent following the suggestion therein contained, immediately applied to the United States Courts, for the purpose of securing a remand of the case to this Court, and on such application presented the material portion of the foregoing facts, and the matter was discussed before Judge Hough. Before him came up directly, the question as to whether the petition and record was jurisdictionally defective or not, and therefore the precise question as to whether the amount of the counterclaim could be considered in determining as to whether the jurisdictional sum of $3,000 was the amount in controversy in said suit, in order to attach jurisdiction to the Federal Courts. After hearing arguments Judge Hough wrote the following opinion:

"When this matter was argued the record on removal was not in Court. If it had been the motion would not have been held until now. The opinion of Judge Lacombe in Crane Co. vs. Guanica Centrale 132 Fed. Rep., 713, merely states what for many previous years had been the practice of this Court,—i. e., doubtful cases were always remanded.

Rulings of this nature are admittedly unsatisfactory. Counsel and parties are entitled to a clearcut statement of the law if it is possible to make one;—and it would seem as if the removal acts were sufficiently old by this time to enable a Court to select what appeared to be the best of conflicting rules.

[On margin:] O. K. J. A. McC.

Since no case (irrespective of amount involved) can be removed
142 over which the United States Court might not have had original jurisdiction, it has always seemed to me illogical to consider a counterclaim in ascertaining the propriety of removal or remand.

In the State of New York there is no compulsion on a defendant to set up a counterclaim. It is always optional with the party possessing it to reserve his affirmative demand for an independent suit. Imagine this action brought originally in this Court; the defendant would only have been obliged to appear and move on the pleadings to dismiss the complaint without prejudice. Such a motion would have been granted as of course.

Thus it appears that an action of the most trifling nature may (under defendant's contention) be removed to this Court at the option of defendant if he can assert a counterclaim of sufficient size. That this was never the intent of the statute I am clear. Considering however, the confusion of decisions and (so far as I know) the failure of late years to observe the difference between the Act of 1875 and that of 1888, I should have felt impelled to consider and classify decisions were it not for the consideration next to be stated. If it

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be true that by a preponderance of ruling the affirmative claims set up in an answer are to be considered in determining jurisdiction, it is at least necessary that somewhere and in some shape the defendant who sets up counterclaim- shall plead them in a manner which enables his opponent to criticise them, modify them or expunge them as may be proper under the rules of good pleading.

In this case,) and in any similar case under the Act of 1888 there is no answer. The only knowledge that to this moment plaintiff has regarding defendant's counter-claim is contained in the petition for removal,—the language of which petition sets forth no reason whatever for the recovery by the defendant from the plaintiff of any sum of money at all. The petition says in substance that the defendant has a counterclaim, without stating what it is. Whatever may be the preferred rule, when in a proper and formal manner the amount in controversy between the parties is made to appear and shown to exceed $3,000 exclusive of interest and costs;—I feel justified in holding, and do hold, that it is impossible to show that such controversial amount exists in any such manner as this defendant has attempted.

For this reason the motion to remand is granted, with $20 costs.

Feltenstein v. Yankaus. U. S. Dist. Ct.

Nov. 15th, 1915.

HOUGH, *J.*

[On margin:] O. K. J. A. McC.

That opinion we submit is stare decisis on the question and upon such opinion, an order was entered by said Judge Hough on
143 November 16th, 1915, in the United States District Court, and by said order, said Judge Hough did remand and return the above entitled action to this Court. A copy of said order was served on defendant's attorney.

That by virtue of the provisions of Section 28-29 of the Federal Judicial Code, the defendant herein cannot appeal from an order granting the remand and therefore the decision of Judge Hough is final. Nor have plaintiffs affected their right to proceed in this Court by participating in the sevral applications in the United States Court (Crane Co. v. Guanica Centrale, 132 Fed. Rep. 713, Tierney v. Helvetia Swiss Fire Ins. Co. 126 App. Div. 446, 110 Sup. 613). The real reason for bringing on this application is very evident. Judge O'Dwyer has recently by decision printed in the Law Journal granted plaintiff's application directing the defendant to turn over a sum sufficient to pay the said judgment, interest, Sheriff's fees and poundage to the Sheriff, to be applied towards the payment of the said judgment, interest and fees, and said Justice who has had submitted to him the proposed order on such application is about to sign such order, and attempt is made to prevent plaintiff from securing the benefits of the third party proceedings, and therefore this method is found of securing a stay of proceedings. Undoubtedly if this motion is denied, other tactics will be folowed to prevent plaintiffs from collecting their judgment.

[On margin:] O. K. J. A. McC.

It is therefore respectfully submitted that in view of the fact that Judge La Fetra has already decided the proposition now brought up on this application squarely, and which is coming up for
144 final determination before the Appellate Term, it is submitted, that the motion herein should be denied with costs.

ABRAHAM ROSENSTEIN.

Sworn to before me this 3rd day of December, 1915.

ROSE ADLER,
Notary Public, Bronx County.

Cert. filed in New York Co.

A copy.

[Seal City Court of the City of New York.]

THOMAS F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, canceled F. 10, '16. City Court, New York.]

145 *Index Number* —, *Year* 191–.

City Court of the City of New York.

Special Term (Dec. 3, 1915).

(Numbered 1-4.)

MOSES FELTENSTEIN and ANO.
against
BALTRUS S. YANKAUS.

Present: Hon. Peter Schmuck, Justice.

The following papers used on this motion — this day:

Notice of Motion and affidavits Annexed	.....
Order to Show Cause and Affidavits Annexed	1–2
Answering Affidavits	3
Replying Affidavits	.....
Filed Papers	.....
Commission	.....
Exhibits	.....
Copies papers	4
Referee's Report	.....
Stenographer's Minutes	.....
Stipulation	.....
Printed Book	.....
Plaintiff's Brief	.....
Defendant's Brief	.....
.....	.....
.....	.....
.....	.....

Upon the foregoing papers this motion is denied.

See opinion. P. S., *J. S. C.*

Dated: Dec. 3, 1915.

A copy.
J. G.

A copy.

[Seal City Court of the City of New York.]

THOMAS F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, canceled F. 5, '16. City Court, New York.]

SIR: Please take notice that the within is a true copy of an order duly — and entered in the within entitled action, and filed in the office of the clerk of the within named Court at his office 32 Chambers Street, Manhattan, City of New York, on the 3rd day of December, 1915.

New York, December 4th, 1915.

VIRGINIUS VICTOR ZIPRIS,
Attorney for Plaintiffs.

309 Broadway, Manhattan, City of New York.

EDWARD G. DELANEY,
Attorney for Defendant.

[Endorsed:] City Court of the City of New York. Moses Feltenstein and ano. Plaintiff-, against Baltrus S. Yankaus, Defendant. Order and Notice of Entry.

146 City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

SIRS: You will please take notice, that the defendant, Baltrus S. Yankaus hereby appeals to the Appellate Term of the Supreme Court, First Department, from the order of Hon. Peter Schmuck, one of the Justices of the City Court of the City of New York, dated December 3rd, 1915, and filed on said day in the office of the Clerk of the said court, denying said defendant's motion to vacate and set aside the judgment entered herein in this court, on the 26th day of October, 1915, in favor of above named plaintiffs and against said defendant for the sum of Eight Hundred and Eighty-two ($882.78) Dollars, seventy eight cents, upon the ground that the said judgment was

void, in that the said City Court of the City of New York was then without jurisdiction to render such judgment, and upon the several other grounds mentioned and set forth in the Notice of Motion or order to show cause therein; and said defendant hereby appeals from the whole of said order and from each and every part thereof.

Dated, New York, December 9th, 1915.

Yours, &c.,

EDWARD G. DELANEY,
Attorney for Defendant,
154 *Nassau Street, Borough of*
Manhattan, City of New York.

To Virginia Victor Zipris, Esq., Attorney for Plaintiffs.
Thomas F. Smith, Clerk of the City Court of the City of New York.

A copy.

[Seal City Court of the City of New York.]

THOMAS F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled F. 10, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

147 [Endorsed:] City Court of the City of New York. Moses Feltenstein and Abraham Rosenstein, Plaintiffs, against Baltrus S. Yankaus, Defendant. Notice of Appeal. Edward G. Delaney, Attorney for defendant, 154 Nassau Street, Borough of Manhattan, City of New York.

148 Appellate Term, Supreme Court, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

SIR: Please take notice that upon the notice of appeal served and filed herein on December 9th 1915, and the annexed affidavit, the undersigned will move this Court at a Term thereof, to be held at the County Court House, in the Borough of Manhattan, City of New York, on the 20th day of December, 1915, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the appeal taken by the defendant herein, from the order of Hon. Peter Schmuck, one of the Justices of the City Court of the City of New York, dated, December 3rd, 1915, which denies defendant's motion to vacate and set aside the judgment rendered

herein, on the ground that the appeal herein has become academi and for such other and further relief as may be just.

Dated, New York, December 14th, 1915.

Yours, &c.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Plaintiffs,
#309 *Broadway, Borough of*
Manhattan, City of New York.

To Edward G. Delaney, Esq., Attorney for Defendant, 154 Nass Street, Manhattan, City of New York.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 191 10 cents, canceled Feb. 10, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

149 Supreme Court, Appellate Term, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

CITY AND COUNTY OF NEW YORK, *ss:*

Abraham Rosenstein, being duly sworn, desposes and says: Tha he is one of the plaintiffs in this action. That defendant herein ha appealed from an order dated December 3rd, 1915, made in the Cit Court of the City of New York, which denied defendant's motion t vacate and set aside a judgment entered in said City Court on Octobe 6th, 1915, in plaintiffs' favor and against the defendants for $882.7 the said motion being made on the ground that the said judgmen was void in that the said City Court made such order when it had n further jurisdiction in the matter.

That notice of appeal on said appeal was served December 9t 1915. No case on appeal has been served and nothing further ha been done by the defendant-appellant since the service of said notic of appeal.

However, since said notice of appeal was served, matters have oc curred which have made this appeal futile and the questions to b decided thereon wholly academic and purposeless, and the followin are the facts:

[On margin:] O. K. J. A. McC.

Plaintiffs instituted an action against the defendant in the Cit

Court for the sum of Eight hundred ($800) Dollars and defendant was served with summons and complaint in the action. Before his time to plead had expired about October 16th, 1915, defendant filed with the Clerk of the City Court, a bond and petition on re-
150 moval to the United States District Court, notice of such fact having been given to plaintiff's attorney. The plaintiffs could have entirely ignored the said bond and petition because of the absolute total insufficiency of the petition to effect a removal, but to make no question about it. The plaintiffs applied by motion, to the said City Court, that it make an order disregarding the said pretended removal and to set the same aside, and that the said City Court declare that it retain jurisdiction of that action, and that the said petition of removal be rejected and it be declared that this case was one not properly removable to the Federal Court, and after due hearing before Mr. Justice La Fetra in the City Court, at which the defendant appeared and was heard, an order was made in said City Court, granting entirely the relief requested by the plaintiffs as above stated. Thereupon an order was made on such Justice's decision, dated and filed in said City Court on October 25th, 1915, declaring that the said action was not removable to the Federal Courts, and that the said City Court continue to retain jurisdiction of the action as though such removal had not been made. A copy of the said order was served upon the attorney for the defendant. The defendant then being in default for failing to serve an answer or other pleading, the plaintiffs entered a judgment against the defendant by default on or about October 26th, 1915, in the sum of Eight Hundred ($800) Dollars, and with costs aggregating $882.78.

Thereafter, and about November 5th, 1915, the defendant appealed to this Court both from the said order of Judge La Fetra and from the said judgment by serving and filing a notice of appeal.

Thereafter the appeal from the said order and judgment came on to be heard before this Court and by an order made on or about December 13th, 1915, the said order of Judge La Fetra was affirmed with $10 costs and the appeal from the said judgment dismissed with $10 costs.

[On margin:] O. K. J. A. McC.

On said appeal it was the contention of the defendant-appellant that Judge La Fetra had no right to make said order, nor
151 could the said judgment be entered for the reason that the moment defendant filed his petition on removal in said City Court on October 16th 1915, this case instanter ceased to be pending in the City Court and from then on became one pending in the Federal Courts, it being defendant's further argument that if the case was not one that was properly removable, the Federal Courts were wholly and solely the judges of those facts, which could be determined on a- application to remand.

The respondents' argument in opposition was, that the City Court never lost jurisdiction of the action for the reason that the petition was wholly and jurisdictionally fatally defective and that therefore

under numerous decisions of both the State and Federal Courts, the State Court was not ousted of its jurisdiction and could for itself determine on the petition or record on removal as to whether the petition or record presented facts sufficient to effect a removal; and in being presented to the Court, the fact that the suit was brought to recover $800 and that no counterclaim had been interposed although a promise of one had been stated in the petition, that the sum of $3,000 or more, was not the subject of controversy which is the only amount in dispute that could fasten original jurisdiction in the United States Courts, as above stated.

The respondents' arguments seem to have prevailed and this Court has decided by its affirmance that the order was proper. In fact, prior to this Court's affirmance, the plaintiffs who were forced into the United States Courts by a stay which was granted there against them pending an application to remand, but applied to the United States Courts for an order to remand the case, and after due deliberation, Judge Hough, on November 16th 1915, wrote a lengthy opinion and declared that the case should be remanded for the reason that the petition and record on removal in this case was fatally jurisdictionally defective and did not show sufficient facts to effect a remo-al.

[On margin:] O. K. J. A. McC.

152 That thereafter and about November 30th, 1915, and likewise prior to the determination made by this Court on said appeal, an application was made by the defendant in the City Court, returnable December 3rd, 1915, whey the said judgment and all the proceedings thereunder, should not be vacated and set aside on the ground, among other things, that the judgment was entered at a time when the City Court had no jurisdiction and that no action was pending at the time that the judgment was entered, and that the said City Court had no jurisdiction over it. That the said application then came on before Judge Schmuck of the City Court, and there, precisely the same arguments which were used, on his request for rever-al, were urged, but Judge Schmuck announced that he had no intention of reversing, criticising or questioning Judge La Fetra's order, which was then the subject of said appeal and denied defendant's application resulting in the order made December 3rd 1915, which is now sought to be dismissed.

The very judgment affected by the said order which was sought to be set aside is the very judgment that this Court has already determined should be dismissed. In fact this Court by its affirmance of the order of Judge La Fetra's decision that the City Court continued jurisdiction of this case, notwithstanding that a jurisdictionally defective petition was filed with the Clerk of that Court and that the City Court was the proper forum where such a determination could be had. That being so, and the judgment having been entered because of the City Court's continuance of the jurisdiction of the case, and this Court's determination being tantamount to a decision that the judgment was properly entered, the question has therefore

been decided that the City Court could continue jurisdiction and that the plaintiff properly entered the judgment.

[On margin:] O. K. J. A. McC.

These questions are therefore the precise question that could and would come up on the appeal from Judge Schmuck's order of December 3rd 1915, and as this Court has determined in plaintiff's favor thereon, the questions became academic, and the appeal there-
153 fore useless, and the continuation of the appeal purposeless.

It is therefore respectfully submitted, that the appeal taken December 9th, 1915, from the order of Judge Schmuck, of the City Court, made December 3rd, 1915, be dismissed with costs.

ABRAHAM ROSENSTEIN.

Sworn to before me this 14 day of December, 1915.

CHARLES SAUBERG,
Comm. of Deeds, N. Y. City.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled F. 10, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

154 [Endorsed:] Supreme Court, App. Term. Moses Feltenstein, and ano., Plaintiff-, against Baltrus S. Yankaus, Defendant. Notice of Motion and Affidavit. Virginius Victor Zipris, Attorney for pl'ffs, 309 Broadway, Borough of Manhattan, City of New York. To Edward G. Delaney, Esq.

155 At a Term of the Supreme Court Held for the Hearing of Appeals from the City and Municipal Courts of the First Judicial Department at the County Court House in the City of New York, Borough of Manhattan, on the 20th Day of December, 1915.

Present:

Hon. Charles L. Guy,
" Alfred R. Page,
" Eugene A. Philbin,
Justices.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plff's-Resp'd'ts,
vs.
BALTRUS S. YANKAUS, Def't-Appl't.

Order Upon Motion.

The above named plaintiffs having by notice of motion dated the 14th day of December, 1915, moved for an order herein dismissing

the appeal from the order of the City Court entered in the office of the Clerk of said Court on the 3rd day of December, 1915.

Now upon reading and filing the affidavit of Abraham Rosenstein, verified the 14th day of December, 1915, in favor of said motion and the memorandum for the defendant in opposition,

It is ordered that the said motion be and the same hereby is granted and appeal dismissed.

Enter,

C. L. G.,
Justice Supreme Court Sitting in Appellate Term.

[Seal City Court of the City of New York.]

[On margin:] O. K. J. A. McC.

Copy.
T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

156 SIR: Please take notice that the within is a true copy of an order duly made and entered in the within entitled action and filed in the office of the Clerk of the within named Court at his office County Court House, in the City of New York, Borough of Manhattan, the *the* 20 day of Dec., 1915.

Dated, N. Y., Dec. 22, 1915.

Yours, etc.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Pl'ff.

Office and Post Office Address, 309 Broadway, Borough of Manhattan, New York City.

To Edward G. Delaney, Esq., Attorney for Def't.

[Endorsed:] Supreme Court, New York County. Moses Feltenstein and Abraham Rosenstein, Plaintiff, respd., against Baltrus S. Yankaus, Defendant, appl't. Order and notice of entry. Virginius Victor Zipris, Attorney for plaintiffs, 309 Broadway, Borough of Manhattan, New York City.

157 Supreme Court, Appellate Term, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-
against
BALTRUS S. YANKAUS, Defendant-Appellant.

(Appeal from Order of Schmuck, J.)

Order to Show Cause.

[On margin:] O. K. J. A. McC.

Upon the annexed affidavit of Baltrus S. Yankaus, verified the 27th day of December, 1915, upon the order of Mr. Justice Schmuck

dated December 3rd, 1915, denying the motion of defendant to vacate and set aside a certain judgment entered by the plaintiffs against the defendant, on the 26th day of October, 1915, in the City Court of the City of New York, for the sum of $882.78, upon the grounds that said judgment was a void judgment; that at the time of the rendition of said judgment, no action was pending in said City Court in favor of plaintiffs and against defendant; that on said date, the City Court had no jurisdiction over the subject matter of the action nor over the defendant; that such judgment was obtained by plaintiffs against defendant in an action purporting to be in the City Court of the City of New York, whereas at said time when such judgment was entered, no action was then pending by plaintiffs against said defendant, and that the only action then pending between said parties was in the United States District Court, for the Southern District of New York; that the rendition of said judgment in the City Court against said defendant on October 26th, 1915, was contrary to and in violation of the statutes and laws of the United States (U. S. Comp. Stat., Secs. 1010 and 1011; Jud. Code, Secs. 28 and 29); that the rendition of said judgment on said date in said City Court and the enforcement thereof against defendant
158 and the seizure of defendant's property under execution and in proceedings supplementary to execution under such judgment, constituted a taking of defendant's property without due process of law, and was an is in violation of defendant's rights under the Constitution of the United States, 14th Amendment, Sec. 1 thereof; and that said judgment, so rendered as aforesaid against defendant, was and is an invasion of said defendant's civil rights under the said Constitution and laws of the United States, as more particularly set forth in the order to show cause on said motion, dated November 30, 1915; and upon said order to show cause and affidavit used upon said motion; upon the notice of appeal duly taken from said order; and upon all the other papers and proceedings herein, let the plaintiffs or their attorney, show cause at an Appellate Term of the Supreme Court, First Department, to be held at the County Court House in the Borough of Manhattan, City of New York, on the 30th day of December, 1915, at 10:00 o'clock of that day, or as soon thereafter as counsel can be heard, why an order granting leave to the above named defendant to appeal from the determination of said Appellate Term, dismissing the said appeal, to the Appellate Division of the Supreme Court, First Department, should not be made and allowed herein, pursuant to Section 1344 of the Code of Civil Procedure, and the rules and practice of this Court; and why defendant should not have such other and further order or relief in the premises as may be just and proper.

And until the hearing and decision of this motion and the entry of an order thereon, let all proceedings on the part of the plaintiffs, their attorney, the Sheriff of the County of New York, and all other persons, with respect to the enforcement and collection of said judgment, be and they are hereby stayed, including judgment for costs on appeal herein.

[On margin:] O. K. J. A. McC.

Let service of a copy of this order upon said plaintiffs or
159 their attorney, on or before the 28th day of December, 1915, be deemed good and sufficient service thereof.

Dated, New York, December 28th, 1915.

CHARLES L. GUY,
Justice New York Supreme Court,
Sitting at the Appellate Term.

[Seal City Court of the City of New York.]

A copy.
T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

160 Supreme Court, Appellate Term, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Affidavit.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Baltrus S. Yankaus, being duly sworn, deposes and says:

1. I am the defendant and appellant in above entitled action.

2. On October 26th, 1915, a judgment was entered by the plaintiffs in the City Court of the City of New York, without notice and against this defendant, for the sum of Eight Hundred, eighty-two and 78/100 ($882.78) Dollars, in an action purporting to be pending in said City Court, but which said action had previously been removed into the United States District Court, for the Southern District of New York, by the defendant, pursuant to the laws and statutes of the United States (U. S. Comp. Stat. Secs. 1010 and 1011; Jud. Code Secs. 28 and 29), and which was then pending in said United States District Court, and under the circumstances following, to wit:

(*a*) An action was commenced in the City Court of the City of New York, and service of the summons and complaint therein made on defendant, on October 11, 1915.

[On margin:] O. K. J. A. McC.

(*b*) On October 16th, 1915, before the expiration of the 6 days' time allowed defendant, to answer or plead in that action had
161 expired, said defendant caused a petition and Surety Company bond, duly approved, to be filed in the said City Court,

for the removal of the action from that Court to the United States District Court, Southern District of New York, in such case made and provided. (U. S. Comp. Stat., Secs. 1010 and 1011; Jud. Code Secs. 28 and 29).

(c) On October 15th, 1915, pursuant to the provisions of said statutes above mentioned, due notice of intention to file said petition and bond, was given to the plaintiffs in the action, but the plaintiffs took no steps whatever prior to said filing to prevent either the filing or acceptance of either the petition or the bond.

(d) On October 26th, 1915, a certified copy of the record on removal was duly filed in the United States District Court, Southern District of New York, in accordance with the requirements of said statutes; and said case remained pending in said United States District Court until its subsequent remand therefrom to the said City Court of the City of New York.

(e) On or about November 8, 1915, the defendant duly filed his answer to the complaint in said action in the U. S. District Court, about 12 days before the time to answer, plead or demur thereto had expired, pursuant to the provisions of the U. S. statutes above mentioned.

(f) On November 16th, 1915, by order of U. S. District Judge Hough, the action was remanded from said U. S. District Court to the City Court of the City of New York.

[On margin:] O. K. J. A. McC.

3. After the removal by the defendant of the action from the City Court to the United States District Court, in the manner pursuant to the provisions of the U. S. statutes aforesaid, and before it was remanded by order of November 16th, 1915, the plaintiffs, on a motion made by them in the City Court of the City of New York, obtained from Mr. Justic La Fetra, one of the Justices of said City Court, and order dated October 25th, 1915, pur-
162 porting to vacate and set aside the removal of the action, from the City Court to the U. S. District Court, Southern District of New York, in the manner and as provided by the U. S. statutes aforesaid, and declaring that said City Court continued to retain jurisdiction over the action.

4. On October 26th, 1915, without notice of any kind to defendant, the plaintiffs entered judgment in their favor, in said City Court and against the defendant, for Eight Hundred eighty-two 78/100 ($882.78) Dollars.

5. On or about October 27th, 1915, the plaintiffs issued execution upon the said judgment, and instituted proceedings supplementary thereto, and obtained an order or orders therein, whereby they seized and attached certain property of the defendant, consisting of a cash account with the Equitable Trust Company, amounting to over Five Thousand ($5,000) Dollars, and by means thereof, prevented defendant from in any way disposing of said property and moneys until the same should be applied to the payment of said judgment, interest and costs, together with Sheriff fees, and costs allowed in

said proceedings, and that said proceedings are now pending and in force against this defendant and his said property tied up thereby.

6. After the entry of said judgment of October 26th, 1915, which defendant claimed and still claims is void for want of jurisdiction in the City Court, at the time of the rendering of said judgment therein, over the subject matter of the action or over the defendant, on or about October 29th, 1915, moved in the U. S. District Court, Southern District of New York, for an order restraining and enjoining the plaintiffs from further proceeding in the City Court in any alleged action therein, against defendant.

[On margin:] O. K. J. A. McC.

7. That the said motion of the defendant, was heard before Circuit Judge Lacombe, sitting in the said U. S. District Court, who in his decision, granting the said motion, used the following language:

"Plaintiffs' proper course would have been to make a
163 motion to remand; this he may now do. When such motion is made and granted, the cause may proceed there; it is now here. Plaintiffs are enjoined until remand is made from proceeding further in the State Court."

An order was entered thereupon, dated November 4th, 1915, enjoining the plaintiffs in the City Court, until the action should be remanded there on proper motion, as outlined in said decision of Judge Lacombe.

8. Subsequent, the plaintiffs made a motion in the U. S. District Court, Southern District of New York, upon notice to the defendant, to remand the said action from the said U. S. District Court to the City Court of the City of New York, and that an order was made on said motion by District Judge Hough, and filed therein November 16th, 1915, remanding said action. The plaintiffs caused said order to be filed in the office of the Clerk of the U. S. District Court and served a copy thereof on defendant's attorney.

9. That in order to save and protect his civil and statutory and constitutional rights as defendant in the action aforesaid, and before the 10 days' time allowed by law therefor had expired, said defendant, on November 5th, 1915, duly appealed to the Appellate Term of the Supreme Court, First Department, from the said judgment of October 26th, 1915, and from the said order of Mr. Justice La Fetra, dated October 25th, 1915.

10. That said appeal from said judgment and order, duly came on for argument at the December, 1915, term of this Court and was argued and submitted on December 6th, 1915, being No. 10 on the motion calendar of that day.

[On margin:] O. K. J. A. McC.

11. That this Court has recently, and at said December term thereof, decided said appeal in favor of the respondents therein, by affirming the said order of October 25th, 1915, with costs, and dismissing the appeal from the judgment of October 26th, 1915, with costs, as more fully appears from the order therein.

164 12. That after the action was remanded to the City Court by order of U. S. District Judge Hough, filed therein Novem

ber 16th, 1915, the defendant duly moved in said City Court, by order to show cause, for an order to vacate and set aside the said judgment of October 26th, 1915, upon the ground that the same was a void judgment, and should be vacated and set aside, upon the several grounds therein stated, among which were the following, to wit:

First. That at the time of the rendition of said judgment there was no action pending in the City Court in favor of plaintiffs and against defendant.

Second. That on October 26th, 1915, the City Court had no jurisdiction over the subject matter of the action, nor over the defendant.

Third. That the said judgment was obtained by plaintiffs against defendant in an action purporting to be in the City Court, whereas the only action then pending between said parties was an action in the U. S. District Court for the Southern District of New York, and that no proceeding of any kind was pending in the City Court of the City of New York, between said parties.

Fourth. That the rendition of the said judgment of October 26th, 1915, against the defendant, was contrary to law and in violation of the statutes and laws of the United States (U. S. Comp. Stat. 1010 and 1011, Jud. Code Secs. 28 and 29).

[On margin:] O. K. J. A. McC.

Fifth. That the rendition of said judgment in the City Court upon said date, and the enforcement of said judgment against defendant and the seizure of defendant's property under execution or in proceedings supplementary to execution or otherwise under said judgment, constituted an unlawful taking of defendant's property without due process of law, under color of the statutes of the
165 State of New York governing the rendition of judgments by the City Court of the City of New York, and was and is in violation of his rights under the Constitution of the United States, 14th Amendment, Sec. 1.

Sixth. That the rendition of said judgment in said City Court, at the time and in the manner aforesaid, was and is an invasion of defendant's civil rights under the Constitution and laws of the United States and as more particularly recited and set forth in said motion papers.

13. That said motion, upon the different grounds aforesaid, came on before and was heard by Mr. Justice Schmuck of said City Court, who denied the said motion, following, as claimed by him, the decision and order of Mr. Justice La Fetra, of the same Court, dated October 25th, 1915.

14. That an order upon said motion of the defendant was made by said Justice Schmuck and was filed therein, on the 3rd day of December, 1915, and that the defendant duly appealed to this Court from said order, by notice of appeal duly filed and served December 9, 1915.

15. That thereafter, before the time to file and serve the printed papers on appeal therein had expired pursuant to the rules and practice of this Court, and before said appeal came regularly on for argu-

ment, the plaintiffs made a motion, returnable December 20th, 1915, before this Court, to dismiss the said appeal, upon the grounds that the questions arising therein were academic and had already been passed upon and decided by this Court, upon the appeal from the judgment of October 26th, 1915, and the order of October 25th, 1915, above mentioned, and upon the other grounds mentioned in plaintiffs' said notice of motion.

16. That the said motion of the plaintiffs has been granted and said appeal has been dismissed by this Honorable Court as more fully appears from a notice thereof, published in the Law Journal of December 22nd, 1915.

[On margin:] O. K. J. A. McC.

That upon all the facts above set forth, this defendant re-
166 spectfully prays leave from this Honorable Court to appeal to the Appellate Division, First Department from the determination of this Court dismissing said appeal, and for the reasons and upon the grounds following, to wit:

First. That the defendant's civil rights under the Constitution of the U. S., 14th Amendment, Sec. 1

"* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

are injuriously affected by reason of the judgment of October 26th, 1915, being enforced or carried out as threatened, against the defendant, so that he will be deprived of his property without due process of law, in violation of the Constitution and statutes aforesaid, and without being given his proper day in Court or an opportunity to defend the action against him, or to establish his just and legal claims and rights in the action.

Second. That moreover the validity of the said statutes of the United States (U. S. Comp. Stat., Secs. 1010 and 1011, Jud. Code Secs. 28 and 29) with respect to the removal of this action from the City Court into the United States District Court, and the construction and interpretation of such U. S. statutes are directly and necessarily involved in this appeal, as well as the legal authorities and decisions of the U. S. Supreme Court and of the Several Federal and State Courts, bearing upon the subject, and some of which have been referred to and cited on the brief of appellant, on the appeal from the said judgment of October 26th, 1915, and the order of October 25th, 1915, decided at said December Term, and to which I beg leave to refer and make a part of this motion.

[On margin:] O. K. J. A. McC.

Third. That as more particularly appears from the motion papers before Mr. Justice Schmuck, who made the order herein appealed from, and which are above referred to and herewith submitted,
167 there are other, different and distinct questions from those involved in the appeal from the judgment of October 26th, 1915, and the order of October 25th, 1915.

Fourth. That the judgment of October 26th, 1915, was entered in the City Court after the action had been removed from that Court into the U. S. District Court, where it then was, and before it was remanded back into the City Court, by order of November 16th, 1915, made by District Judge Hough; and also that the order of October 25th, made by Mr. Justice La Fetra, under the same circumstances was made after the said action was removed and before the City Court had again acquired jurisdiction by reason of the order to remand of November 16th, 1915, made by District Judge Hough.

Fifth. Moreover, the claim of the plaintiffs, made upon the other appeal, was that the judgment of October 26th, 1915, entered by plaintiffs, was a "default" judgment from which no appeal could be taken to this Court; nevertheless, while denying this, and insisting that it was a void judgment and appealable, this defendant verily believes and urges herein that the order denying his said motion to vacate and set aside the said judgment as void and rendered without jurisdiction, and on the other several grounds set forth by defendant, was properly appealable to this Court, raised entirely new and important questions of law, and should accordingly have been regularly heard and passed upon by this Court.

Sixth. That the appeals taken herein are meritorious and affect substantial rights of the defendant, and involve important questions concerning the jurisdiction of the State and Federal Courts, and the Constitution of the U. S. and Acts of Congress, and that unless the appellant is granted such leave he will suffer irreparable loss and damage, and will be deprived of his day in Court.

[On margin:] O. K. J. A. McC.

That upon the several grounds and for the reasons herein set forth, this deponent prays for an order of this Court granting leave
168 to appeal to the Appellate Division of the Supreme Court, First Department, from the order or determination of the Appellate Term, Supreme Court, First Department, dismissing the said defendant's appeal from the order of Mr. Justice Schmuck, dated December 3rd, 1915.

That an order to show cause herein, with stay of proceedings, is now asked for for the reason that a regular notice of motion cannot be given for the December, 1915, Term of this Court, within the time prescribed by the Rules and practice, and for the relief herein asked for; and that it was not possible to have said motion papers properly prepared for presentation and submission to this Court before this date.

That unless a temporary stay of plaintiffs' proceedings is granted herein, this defendant's rights and remedies herein will be seriously impaired, impeached and prejudiced, and his property taken away from him without any present means of redress being afforded him, and he will otherwise suffer great and irreparable loss and injury, while plaintiffs are in nowise prejudiced by such stay, but are amply secured by the judgment, execution and proceedings aforesaid.

That the present application to this Court is made in good faith and not for the purpose of delay, and that in the event the same is

granted, herein, this defendant and appellant will prosecute the said appeal to the Appellate Division with all possible dispatch.

That no previous application for the leave herein sought has been made to any other Court or Justice.

BALTRUS S. YANKAUS.

Sworn to before me this 27th day of December, 1915.

ONA RODER,
Comm. of Deeds, #76, New York City.

Comm. expires Jan. 20, 1916.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

169 [Endorsed:] Supreme Court, Appellate Term, First Department. Moses Feltenstein and Abraham Rosenstein, Plaintiffs-respondents, against Baltrus S. Yankaus, Defendant-appellant. Affidavit and order to show cause. Edward G. Delaney, Att'y for Defendant-appellant, 154 Nassau Street, Borough of Manhattan, City of New York.

170 Supreme Court, Appellate Division, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiff-respondent,
against
BALTRUS S. YANKAUS, Defendant-appellant.

CITY AND COUNTY OF NEW YORK, *ss.:*

Abraham Rosenstein, being duly sworn, deposes and says: That he is one of the plaintiffs in this action.

The defendant seeks this Court's permission to allow him, the defendant, to appeal from an order made at Appellate Term dismissing defendant's appeal taken from an order of the City Court made by Mr. Justice Schmuck, which had denied defendant's motion to vacate and set aside the judgment rendered herein on October 26th 1915, because of its alleged invalidity.

As shown by the brief submitted by deponent on this application no appeal is permitted to be taken from an Appellate Term's order of dismissal of an appeal taken to that Court because there is no special statutory provision, and that therefore this Court would refuse to give leave to appeal from an order which it cannot review.

Were the appeal allowable under any circumstances, it is submitted that the ruling of the Appellate Term below was eminently proper.

[On margin:] O. K. J. A. McC.

The Appellate Term dismissed the appeal taken from the order of the City Court made by Mr. Justice Schmuck on the ground that the questions involved on that appeal were purely academic and that its decision in the case would be wholly purposeless for the simple reason that prior to the making of the motion to dismiss before
171 the Appellate Term this defendant had appealed from an order of the City Court made by Mr. Justice La Fetra which had determined that the City Court continue jurisdiction of this cause which was then pending in the City Court and to repudiate and declare ineffective an attempted or pretended, though abortive removal of that case to the Federal Courts because the petition and record on removal were wholly and jurisdictionally fatally defective and that therefore the City Court's continuance of the action remained undisturbed.

Not only did the defendant herein appeal from the said order, but as well from the judgment entered subsequent to the making of the said order of Judge La Fetra, on which twin appeal the precise questions were involved as to the State Court's right to consider the insufficiency of the petition and record on removal, and the Appellate Term's affirmance of Judge La Fetra's order was tantamount to a declaration that the Court had a right to enter the judgment in question. In fact, the Appellate Term considered the very questions and dismissed the appeal from the judgment following the natural conclusion that if the order of Judge La Fetra was right, which it so declared to be, that then the judgment that was entered thereafter was entered at a time when the City Court continued with the jurisdiction of the case.

The Appellate Term therefore, because of its determination and affirmance, held not only that the questions were academic and already decided on the twin appeal, but also that the appeal from the judgment was already a determination which foreclosed a second appeal, which in effect the appeal from Judge Schmuck's order amounted to. Further, that as the Appellate Term had dismissed the appeal from the judgment, the appeal taken from Judge Schmuck's order became purposeless.

[On margin:] O. K. J. A. McC.

If there is any further doubt created in the matter deponent respectfully refers to the full affidavit that he has interposed on another motion made in this very same action before this Court on the same day that this motion comes on to be heard, on an
172 appeal taken from Judge La Fetra's order, and from which the Court will see that both appeals taken by the defendant herein are absolutely without merit.

Besides, the defendant herein comes to this Court with ill grace for the reason that he had repeatedly and continuously repudiated

the jurisdiction of the State Courts, and has in fact ignored the various orders of the City Court and has several times brought these plaintiffs into the Federal Courts to defend against motions made by the defendant.

In fact, about December 31st, 1915, this very defendant instituted in the Federal Courts, of the Eastern District of New York, an action against these plaintiffs brought in equity to secure a determination of the Federal Court, that the very judgment in question be vacated and set aside and nullified on the precise grounds on which the appeal herein is based, and in fact in that Court made a motion which was argued on January 5th, 1916, to stay these plaintiffs from proceeding under their judgment until the determination of that action, which motion remains undecided but which deponent confidently believes will be denied when both parties to the action have submitted their briefs and papers.

In view of the above facts and particularly in view of the authorities of this Court which hold that this Court will not review an order of the Appellate Term dismissing the appeal pending therein, the motion herein should be denied, with costs.

ABRAHAM ROSENSTEIN.

Sworn to before me this 21st day of January, 1916.

CHARLES SOMBERG,
Com. of Deeds, N. Y. City.

A Copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

173 [Endorsed:] Supreme Court. Appellate Division. First Department. Moses Feltenstein and Abraham Rosenstein. Plaintiffs-resp'd'-, against Baltrus S. Yankaus. Defendant-app'l't. Affidavit in opposition. Virginius Victor Zipris, Attorney for plaintiffs, 309 Broadway, Borough of Manhattan, City of New York.

174 At a Term of the Supreme Court Held for the Hearing of Appeals from the City and Municipal Courts of the First Judicial Department, at the County Court House, in the City of New York, Borough of Manhattan, on the 31st Day of December, 1915.

Present:

Hon. Charles L. Guy,
" Alfred R. Page,
" Eugene A. Philbin,
Justices.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiff-respondents,
against
BALTRUS S. YANKAUS, Defendant-appellant.

Order on Motion for Leave to Appeal to the Appellate Division.

The appeal in the above-entitled action having been dismissed upon appeal by the Appellate Term, of the Supreme Court, and the defendant having moved for leave to appeal to the Appellate Division, First Department, from the determination of said Appellate Term,

Now upon reading and filing the notice of Motion dated the 28th day of December, 1915, and due proof of service thereof and the affidavits of Baltrus S. Yankaus, verified the 27th day of December, 1915, in support of said motion, and the affidavit of Abraham Rosenstein, verified the 30th day of December, 1915, in opposition,

It is ordered that said motion for leave to appeal to the Appellate Division, First Department, be and the same is hereby dismissed and stay vacated, with $10 costs.

Enter.

C. L. G.,
Justice Supreme Court, Sitting in App. Term.

A copy.

[Seal of Court.]

WM. F. SCHNEIDER, *Clerk.*

Int. Rev. St.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

175 [Endorsed:] Supreme Court, New York County. Moses Feltenstein and Abraham Rosenstein, Plaintiff, resp., against Baltrus S. Yankaus, Defendant, app. Order and notice of entry Virginius Victor Zipris, Attorney for p'lffs-resp't'ts, 309 Broadway Borough of Manhattan, New York City.

SIR: Please take notice that the within is a true copy of an order duly made and entered in the within entitled action, and filed in the office of the Clerk of the within named Court at his office County Court House in the *County Court House, in the* City of New York Borough of Manhattan, the 31 day of December, 1915.

Dated, N. Y., Jan. 3, 1916.

Yours, etc.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Pl'ff.

Office and Post Office Address, 309 Broadway, Borough of Manhattan, New York City.

To Edward G. Delany, Esq., Attorney for Dft't.

176 Supreme Court, Appellate Division, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Appeal from Order of Schmuck, J. Dismissed December, 1915 Term, App. T.

Notice of Motion.

[On margin:] O. K. J. A. McC.

SIR: Please take notice that upon the annexed affidavit of Edward G. Delaney, verified the 5th day of January, 1916, upon the order of Mr. Justice Peter Schmuck, of the City Court of the City of New York, dated December 3, 1915, denying the motion of the defendant, to vacate and set aside a certain judgment entered by the plaintiffs against the defendant, on the 26th day of October, 1915, in the City Court of the City of New York, for the sum of $882.78, upon the grounds alleged on said motion, to the effect, viz:—that said judgment was a void judgment; that at the time of the rendition of said judgment, no action was pending in said City Court, in favor of plaintiffs and against the defendant; that on said date the City Court had no jurisdiction over the subject matter of the action, nor over the defendant; that such judgment was obtained by plaintiff against defendant, in an action purporting to be in the City Court of the City of New York, whereas at such time, when such judgment was entered, no action was pending in said City Court by plain

tiffs against said defendant, and that the only action pending between said parties was the action in the United States District Court, for the Southern District of New York; that the rendition of said judgment in the City Court against defendant, on October 26, 1915, was contrary to and in violation of the statutes and laws of the United States (U. S. Comp. Stat. 1010 and 1011; Jud.
177 Code, Secs. 28 and 29); that the rendition of said judgment on October 26, 1915, in said City Court, and the enforcement of such judgment against said defendant, and the seizure of defendant's property under execution, and in proceedings supplementary to execution, under such judgment, constituted a taking of defendant's property without due process of law, and was and is in violation of said defendant's rights, under the Constitution of the United States, 14th Amendment, Section 1 thereof, and that said judgment so rendered as aforesaid, and its enforcement against the defendant, was and is an invasion of said defendant's civil rights, under the said constitution and laws of the United States, as more particularly set forth in the order to show cause on said motion, dated November 30, 1915; upon said order to show cause on said motion, dated November 30, 1915; upon said order to show cause and affidavit annexed; upon a notice of appeal duly taken from said order of December 3, 1915, and upon all the other papers and proceedings herein, a motion will be made at the Appellate Division of the Supreme Court, First Department, to a Justice of said Appellate Division, First Department, at the Appellate Division Court House, Madison Avenue and 25th Street, in the Borough of Manhattan, City of New York, on the 21st day of January, 1916, at 10 o'clock A. M. of that day, or as soon thereafter as counsel can be heard, for the allowance of an appeal to be taken to such Appellate Division, from the determination of said Appellate Term, First Department, dismissing the above mentioned appeal, pursuant to Section 1344 of the Code of Civil Procedure, and the rules and practice of this Court; and for such other and further order or relief in the premises, as may be just and proper.

Dated, New York, January 5th, 1916.

Yours, &c.,

EDWARD G. DELANEY,
Attorney for Defendant-Appellant.

154 Nassau Street, Borough of Manhattan, City of New York.

To Virginius Victor Zipris, Attorney for plaintiffs-resp'd't, 309 Broadway, Borough of Manhattan, City of New York.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

15—891

178 Supreme Court, Appellate Division, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs-Respondents,
against
BALTRUS S. YANKAUS, Defendant-Appellant.

Affidavit.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Edward G. Delaney, being duly sworn, deposes and says:

I am the attorney for the defendant and appellant in the abo entitled action.

That on October 26, 1915, a judgment was entered by the abo named plaintiffs in the City Court of the City of New York, witho notice and against the defendant herein, for the sum of $882.7 in an action purporting to be then pending in said City Court, b which said action had previously been removed into the Unite States District Court, for the Southern District of New York, by th said defendant, pursuant to the laws and statutes of the Unite States (U. S. Comp. Stat., Secs. 1010 and 1011; Jud. Code, Se 28 and 29), and which said action was then pending in said Unite States District Court, under the circumstances following, to wit:

The action was commenced in the City Court of the City of Ne York, by said plaintiffs against said defendant, and service of th summons and complaint therein was made on said defendant o October 11, 1915.

[On margin:] O. K. J. A. McC.

On October 16, 1915, before the expiration of the six day time allowed by law to said defendant, in said City Court,
179 answer or plead in that action had expired, said defenda caused a petition and surety company bond, duly approved be filed in said City Court, for the removal of the action from th Court into the United States District Court, Southern District New York, pursuant to the laws and statutes of the United States such case made and provided (U. S. Comp. Stat., Secs. 1010 a 1011; Fed. Jud. Code, Secs. 28 and 29).

That on October 15, 1915, pursuant to the provisions of sa United States statutes, due notice of intention to file said petition a bond was given by said defendant to the plaintiffs in the action, b that plaintiffs took no steps whatever prior to the said filing in t said City Court in relation thereto, or in relation to such intend removal of the action.

That on October 20, 1915, a certified copy of the record on moval in said action, was duly filed in the United States Distr Court, Southern District of New York, in accordance with the quirements of the United States statutes above mentioned, and th

said cause thereafter remained and was pending in said United States District Court, until its subsequent remand to the said City Court of the City of New York, pursuant to order of District Judge Hough, of said U. S. District Court, filed therein November 16, 1915, and hereinafter referred to.

That after the removal of the action and on or about November 8, 1915, about twelve days before his time to answer, plead or demur thereto would have expired, pursuant to the provisions of the United States statutes aforesaid, the defendant duly filed his answer to the complaint in said action in the United States District Court, for the Southern District of New York.

[On margin:] O. K. J. A. McC.

That on November 16, 1915, and subsequent to the filing of said defendant's answer as aforesaid, and by order of District Judge Hough, on a motion made by plaintiffs in said U. S. District
180 Court, Southern District of New York, *to* the action was remanded from the said United States District Court, to the City Court of the City of New York, as more fully appears from said order, on file as aforesaid.

That the plaintiffs in the action after the removal by the defendant of said action from the City Court to the United States District Court, Southern District of New York, in the manner and pursuant to the provisions and requirements of the United States statutes aforesaid, and before said action was remanded to said City Court by order of November 16, 1915, as above set forth, on a motion made by them in the City Court of the City of New York, obtained from Mr. Justice La Fetra, one of the Justices of said City Court, an order dated October 25, 1915, purporting to vacate and set aside the renewal of the action from the City Court to the United States Court, for the Southern District of New York, as provided by the United States statutes aforesaid, and declaring that said City Court continue to retain jurisdiction over the said action.

That on October 26, 1915 following, without notice of any kind to the defendant, the plaintiffs entered judgment in said City Court, in favor of said plaintiffs and against said defendant, for $882.78.

[On margin:] O. K. J. A. McC.

That on or about October 27, 1915, the plaintiffs, issued execution upon said judgment, and instituted proceedings supplementary thereto, and obtained an order or orders therein in said City Court, whereby they seized and attached certain property and moneys of the defendant, consisting of a cash account with the Equitable Trust Company, amounting to over Five Thousand Dollars and that by means of said orders and proceedings said plaintiffs have since prevented defendant from in any way using or disposing of his said property or moneys, until the same should be applied by him to the payment of said judgment, interest and costs, together with Sheriff's
181 fees and costs allowed in said supplementary proceedings and by said orders and that said proceedings are now pending and in force in said City Court against said defendant, and his property is held and tied up thereby.

That after the entry of said judgment of October 26, 1915, against defendant which the said defendant claimed and still claims to be void, for want of jurisdiction in the City Court, at the time of the rendering of said judgment therein, over the subject matter of the action or over the defendant, said defendant, on or about October 29, 1915, made a motion in the United States District Court, Southern District of New York, for an order restraining and enjoining the plaintiffs from further proceeding in said City Court, and against said defendant, in any alleged action therein.

That the said motion of defendant was heard before Circuit Judge Lacombe, then sitting in the said United States District Court, Southern District of New York, and that said Judge, in his decision granting the said motion, used the following language, to wit:—

"Plaintiff's proper course would have been to make a motion to remand; this he may now do. When such motion is made and granted, the cause may proceed there; it is now here. Plaintiffs are enjoined until remand is made from proceeding further in the State Court."

That an order was entered on said defendant's motion, dated November 4, 1915, enjoining the plaintiffs from further proceeding in said City Court, until the action should have been remanded to that Court on proper motion, as was outlined in said decision of Judge Lacombe.

[On margin:] O. K. J. A. McC.

That subsequently and on or about November 5, 1915, the plaintiffs made a motion in the United States District Court, Southern District of New York, upon notice to the defendant, to remand the action from the said United States District Court, Southern District of New York, to the said City Court of the City of New York,

182 and that thereafter an order was made on said motion in said United States District Court, by District Judge Hough, and which was filed therein November 16, 1915, remanding said action to said City Court.

That plaintiffs caused said order to be filed and entered in the office of the Clerk of the United States District Court on said 16th day of November, 1915, and served a copy thereof on the defendant's attorney.

That theretofore, the defendant, in order to save and protect his civil and statutory and constitutional rights, as defendant in the action, and within the ten days' time allowed him by the State law and C. C. P. had expired, did on November 5, 1915, duly appeal to the Appellate Term of the Supreme Court, First Department from the said judgment of October 26, 1915, and from the said order of Mr. Justice La Fetra of the City Court, dated October 25, 1915, above mentioned.

That the said appeal from such judgment and order duly came on for argument at the December 1915 term of said Appellate Term and was argued and submitted on December 6, 1915, before the said Court.

That said Appellate Term thereafter, and during the December

1915 term, decided said appeal in favor of the said plaintiffs and respondents therein, by affirming the said order of October 25, 1915, with costs, and dismissing defendant's appeal from the judgment of October 26, 1915, with costs, as more fully appears from the order of said Appellate Term, entered therein.

[On margin:] O. K. J. A. McC.

That after the said action was remanded to the City Court of the City of New York, by the said order of U. S. District Judge Hough, filed November 16, 1915, as aforesaid, and the action was again in that court the defendant herein duly moved in said City Court, by order to show cause, for an order to vacate and set aside the said judgment of October 26, 1915, upon the ground that such judgment was a void judgment and should therefore be vacated and
183 set aside, and upon the other grounds therein set forth in said motion, among which were the following substantially;

1. That at the time of the rendition of said judgment on October 26, 1915, there was no action pending in the City Court, in favor of plaintiffs and against the defendant.

2. That on said October 26, 1915, the City Court had no jurisdiction over the subject matter of the action, nor over the defendant therein.

3. That the said judgment was obtained by plaintiffs against defendant, in an action purporting to be in the City Court of the City of New York, whereas the only action then pending between said parties, was an action in the said United States District Court, Southern District of New York, and that no other action or proceeding of any kind was pending in the said City Court, between said parties:

4. That the rendition of the said judgment of October 26, 1915, in said City Court against the said defendant, was contrary to law, and was in violation of the statutes and laws of the United States (U. S. Comp. Stat., Secs. 1010 and 1011: Jud. Code Secs. 28 and 29):

5. That the rendition of said judgment in the said City Court, upon said last mentioned date, and the enforcement of said judgment against defendant, and the seizure of defendant's property under execution, or in proceedings supplementary to execution or otherwise, under said judgment, constituted an unlawful taking of defendant's property without due process of law and under color of the statutes of the State of New York, governing the rendition of judgments by the City Court of the City of New York, and was and is in violation of defendant's rights under the Constitution of the United States, 14th Amendment, Sec. 1:

[On margin:] O. K. J. A. McC.

6. That the rendition of said judgment in said City Court, at said time and in the manner aforesaid, was and is an invasion of defendant's civil rights under the Constitution and laws
184 of the United States, and as was more particularly set forth in said motion papers of the defendant.

That said defendant's motion, made upon the different ground aforesaid, came on before and was heard by Mr. Justice Schmuc of said City Court, who denied the said motion following as claime by said Justice, in a memorandum filed by him, the decision an order of Mr. Justice La Fetra, of the City Court theretofore mad and dated October 25, 1915.

That an order upon said motion of the plaintiffs was thereafte made by said Justice Schmuck which said order was filed in th said City Court on the 3rd day of December, 1915, and that th defendant herein duly appealed from said order to the Appellat Term of the Supreme Court, First Department, by notice of appea duly filed and served herein on December 9, 1915.

That thereafter and before the time to file and serve the printe papers therein had expired, pursuant to the rules and practice o this Court and of said Appellate Term, and before said appeal coul regularly be brought on for argument at a regular term of sai Court for the hearing of such appeals, the plaintiffs made a motion returnable December 20, 1915, before said Appellate Term, to dis miss the said appeal, upon the grounds that the questions arisin therein were academic, and had already been passed upon and de cided by said Court, upon the appeal from the judgment of Octobe 26, 1915, and from the order of October 25, 1915, above mentioned and as was more fully set forth in plaintiffs' said motion.

That the said motion of plaintiffs to dismiss said appeal upon th grounds therein stated, was submitted without argument to sai Appellate Term, and without the defendant and appellant havin been orally heard or allowed to be heard thereon, and said motio was afterwards granted and said appeal dismissed by said Court as more fully appears from the order therein, entered upon sai motion on December — 1915.

[On margin:] O. K. J. A. McC.

185 That the said Appellate Term, as this deponent verily be lieves, erroneously determined said appeal, in dismissing th same upon the motion of the plaintiffs aforesaid, and for the severa reasons and upon the grounds hereinafter set forth herein.

That thereafter, an application for leave to appeal from said de termination of the Appellate Term in dismissing the said appea above mentioned, to the Appellate Division, Supreme Court, Firs Department, was made to said Appellate Term, but that such motio for leave to appeal was dismissed with costs, as more fully appear from order dated December 31, 1915, and filed and served herein

That by reason of the foregoing facts, and of the errors claime to have been committed by said Appellate Term, in its determinatio dismissing the appeal, aforesaid, and in overlooking or misappr hending the principles of law and the authorities urged in beha of the appellant therein, the said appellant hereby begs leave fro this Court to appeal to the said Appellate Division, from such dete mination of the Appellate Term as aforesaid, and submits in bri the following grounds, therefor:—

[On margin:] O. K. J. A. McC.

1. That the defendant's civil rights under the Constitution of the United States as provided in the 14th Amendment, Section 1 thereof, viz:—

"* * * Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law."

are injuriously and unjustly affected, by reason of the judgment of October 26, 1915, being rendered and enforced or carried out against the defendant, so that he is and will thereby be deprived of his property without due process of law, in violation of the said U. S. Constitution and statutes aforesaid, and without being given his proper day in Court, or an opportunity to appear and de-
186 fend the action against him, or to establish his just and legal claims and rights in said action.

2. That the validity of the said statutes of the United States (U. S. Comp. Stat. 1010 and 1011; Jud. Code, Secs. 28 and 29) with respect to the removal of this action from the City Court into the United States District Court, and the judicial construction and interpretation of such United States statutes, are directly and necessarily involved in this appeal, as well as the judicial authorities and decisions of the United States Supreme Court, and of the several Federal and State courts, bearing upon the subject, some of which authorities have been referred to and cited on the brief of appellant on the appeal from said judgment of October 26, 1915, and from the order of October 25, 1915, decided at said December 1915 term, and to which the appellant again begs leave to refer on this motion.

3. That as more particularly appears from the motion papers before Mr. Justice Schmuck, in said Court, who made the order appealed from, dated December 3, 1915, and which is also herein referred to and herewith submitted, there are other and distinct questions arising from those involved in the appeal from the judgment of October 26, 1915, and from the order of October 25, 1915.

[On margin:] O. K. J. A. McC.

4. That the judgment of October 26, 1915, was entered in said City Court, after the action itself had been removed from that Court into the United States District Court, where it was on said last mentioned date, and before it had been remanded back into the City Court by order of November 16, 1915, made by U. S. District Judge Hough, and that the order of October 25, 1915, made by Mr. Justice La Fetra, under the like circumstances, was made after the action was removed, and before the City Court had again acquired jurisdiction, by reason of and under the said order to remand of November 16, 1915, made by said District Judge Hough.

5. That moreover, the claim made by plaintiffs on the
187 other appeal taken by defendant was that the judgment of October 26, 1915, was a "default judgment" from which no appeal could be taken yet nevertheless, while denying this, and for the purpose of avoiding any possible waiver or objection, but still

insisting that it was a void judgment and appealable, this defend ant, verily believes and urges herein that the order of December 3 1915, denying his said motion to vacate and set aside the said judg ment as void, and rendered without jurisdiction, and on the othe several grounds set forth, was properly appealable and that such appeal otherwise raised important questions of law and the construc tion of the Federal and State statutes and should have been regularly heard and passed upon by said Appellate Term.

6. That the several appeals taken by the defendant herein are meritorious and taken in good faith and affect substantial rights of the defendant including his civil rights and right of property as aforesaid, and otherwise involve important questions concerning the jurisdiction of the State and Federal courts, and the Constitu tion of the United States, and acts of Congress, and that unless the appellant is granted the leave to appeal herein prayed for, he will suffer irreparable loss and damage, and will be deprived of his just and lawful rights, and of his day in court.

That upon the said several grounds, and for the reasons herein set forth, this deponent prays for an order of this Court, granting leave to appeal to the Appellate Division of the Supreme Court First Department, from the order or determination of the Appellate Term, Supreme Court, First Department, dismissing the said de fendant's appeal from the said order of Mr. Justice Schmuck, of the said City Court, dated December 3, 1915.

[On margin:] O. K. J. A. McC.

That except as above set forth, no previous application for the relief herein sought for has been made to any other Court
188 of Justice.

E. G. DELANEY.

Sworn to before me this 5th day of January, 1916.

ONA RODER,
Comm. of Deeds, #76, New York City.

Comm. expires Jan. 20, 1916.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled F. 2, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

189 [Endorsed:] Supreme Court, Appellate Division, First De partment. Moses Feltenstein and Abraham Rosenstein, Plaintiffs-resp'd'ts, against Baltrus S. Yankaus, Defendant-appel lant. Affidavit and Notice of Motion. Edward G. Delaney, Att'y for Defendant-appellant, 154 Nassau Street, Borough of Manhattan City of New York.

190 Supreme Court, Appellate Division, First Department.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Resps.,
vs.
BALTRUS S. YANKAUS, Applts.

22.

Order on Application for Leave to Appeal from Appellate Term.

An application having been made by the defendant to a Justice of the Appellate Division of the First Judicial Department for leave to appeal to the Appellate Division from the determination of the Appellate Term of the Supreme Court in this action entered in the office of the Clerk of the Supreme Court on or about the —— day of —— 1915, dismissing defendant's appeal from an order of the City Court, and the said application having come on to be heard, on reading and filing the notice of application herein, and the affidavit of Edward G. Delaney in support of said application, and the affidavit of Abraham Rosenstein in opposition thereto and after hearing Mr. Edward G. Delaney for the application, and Mr. Abraham Rosenstein opposed,

It is ordered that said application be and the same hereby is denied with $10 costs.

Dated, New York, January 28, 1916.

JOHN PROCTOR CLARKE.

A copy.

[Seal City Court of the City of New York.]

T. F. SMITH, *Clerk*.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

191 SIR: Please take notice that the within is a true copy of an order duly made and entered in the within entitled action and filed in the office of the Clerk of Supreme Court, N. Y. Co. on the 28 day of January, 1916.

Dated, New York, Jan. 28, 1916.

Yours, &c.,

VIRGINIUS VICTOR ZIPRIS,
Attorney for Plff.

Office and Post Office Address, 309 Broadway, Borough of Manhattan, New York City.

To Edward G. Delany, Esq., Attorney for Def't.

[Endorsed:] County Clerk's File No. ——. Year 191——. Supreme Court, Appellate Division, 1st Department. Moses Feltenstein & Abraham Rosenstein, Resp'ts, vs. Baltrus S. Yankaus, App'ts Order on Application for leave to Appeal from Appellate Term. Virginius Victor Zipris, Attorney for Plff., Office and Post Office Address, 309 Broadway, Borough of Manhattan, New York City.

192 City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN
against
BALTRUS S. YANKAUS.

CLERK'S OFFICE,
City Court of the City of New York:

I, Thomas F. Smith, Clerk of the City Court of the City of New York, having compared the annexed answer in the above-entitled action, with the original on file in this office, do certify that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of the City Court of the City of New York, this 3d day of February, A. D. 1916.

THOMAS F. SMITH, *Clerk.*

[Seal City Court of the City of New York.]

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 8, '16. City Court, New York.]

193 United States District Court, Southern District of New York

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs,
against
BALTRUS S. YANKAUS, Defendant.

The defendant, appearing herein by Edward G. Delaney, his attorney, and answering the complaint of the plaintiffs:—

I. Admits the allegations contained in the paragraphs of subdivisions of said complaint, respectively marked and designated, "1, 2, 4 and 5."

II. Admits the allegations contained in paragraph marked "3," except that he denies retaining the plaintiffs to act as counsel in the case of Kietoenos Yankulinois vs. Interborough Rapid Transit Company.

III. Denies each and every the allegations contained in the paragraph or subdivision of said complaint, marked and designated "6" except that he admits that he paid to the plaintiffs the sum of Five Hundred ($500) Dollars.

IV. Denies that he has any knowledge or information, sufficient

to form a belief, as to each and every the allegations contained in the paragraph or subdivision of said complaint, marked and designated "7."

V. Denies each and every the allegations contained in the paragraph or subdivision of said complaint, marked and designated "8," except that he admits that he has not paid to the plaintiffs the sum of One Thousand ($1,000) Dollars.

[On margin:] O. K. J. A. McC.

VI. Admits each and every the allegations contained in the paragraphs or subdivisions of said complaint, respectively marked and designated "10 and 11."

194 VII. Admits each and every the allegations contained in the paragraph or subdivision of said complaint, marked and designated "13."

VIII. Denies each and every the allegations contained in the paragraph or subdivision of said complaint, marked and designated "14."

And as and for a first, separate and distinct defense to the alleged cause of action set forth in the plaintiffs' first cause of action, this defendant alleges:—

[On margin:] O. K. J. A. McC.

IX. That prior to the 4th day of May, 1914, the defendant made and entered into an agreement with the plaintiffs, wherein and whereby the defendant hired and employed the plaintiffs to act as counsel for him, in the conduct of two certain cases, then pending in the District Court of the United States, for the Eastern District of New York, entitled Annie Yanulionis vs. Interborough Rapid Transit Company, and Frank Kaupis vs. Arbuckle Brothers, in which said actions the defendant appeared as attorney of record for the plaintiffs, and which are the same actions mentioned and described in the first cause of action of plaintiffs' complaint; and wherein and whereby the plaintiffs promised, undertook and agreed to act as such counsel, and to the best of their skill and ability to render and perform professional services as attorneys and counsellors-at-law, in the proper conduct and management of said actions, including the making, prosecution or defense of each and every motion, step or proceeding that might be had or taken therein, and the preparation of said actions for trial, the attendance by them in Court whenever said actions appeared upon the trial of other calendars of said Court, the appearance at and trial of said actions by the plaintiff, Moses Feltenstein, the production, offering, making and adducing of all and any proofs and evidence for the proper, full and complete presentation of the claims of the plaintiffs in said action, the

195 taking, prosecution or defense of any and all appeals or proceedings subsequent, as well as prior to the entry of judgments in said actions, and in each and every respect, and undertook to perform and render such services until and including the final determination of said actions; in consideration whereof, and of the services so to be rendered by the plaintiffs as aforesaid, the defendant promised, undertook and agreed to pay to the plaintiffs, a desig-

nated sum of money, out of his fees upon the collection of such judgments from the defendants in said actions.

X. That thereafter and prior to the time that said actions were reached upon the calendar of said Court for trial, and before the execution of the alleged agreement set forth in paragraph "4" of the plaintiffs' complaint, the plaintiff, Moses Feltenstein, acting for and on behalf of himself and his co-partner, the plaintiff, Abraham Rosenstein, stated and represented to the defendant that he was intimately acquainted with one of the attorneys for the defendant in the said action of Kaupis vs. Arbuckle Brothers, which was an action brought to recover damages for personal injuries sustained by the said Kaupis, through the negligence of the defendants in said action, and that by reason of such acquaintance, he was able to bring about the settlement of said action.

[On margin:] O. K. J. A. McC.

XI. That the said plaintiff further stated and represented to the defendant, that he was able to procure the payment by the defendants to the said Kaupis of a couple of thousand dollars, perhaps Three Thousand ($3,000) Dollars, in settlement of said action, and recommended and advised the defendant to accept such settlement, and sought to induce and prevail upon the defendant so to do. That the defendant advised the said Feltenstein that the said proposed settlement, was in the opinion of defendant, entirely inadequate and insufficient, that the defendant would not accept such offer, nor would he advise or recommend the said Kaupis to accept the same. That the defendant therefor- advised the said Feltenstein, that in
196 the opinion of defendant, the plaintiff in said action, the said Kaupis was entitled to receive a large and substantial sum of money as compensation for the injuries sustained by him, and that the defendant would not advise or recommend nor accept a sum less than Fifteen Thousand ($15,000) Dollars, in settlement of said action. That thereupon the said Feltenstein ridiculed the opinion and statement so made by the defendant, and stated and represented to the defendant, and gave it as his opinion, that upon the trial of said action, and by way of any verdict, that the plaintiff, said Kaupis might recover therein a larger sum than the amount which had been stated by him to have been offered in settlement would not be awarded, and that in his opinion, the injuries sustained by the said Kaupis were not worth more than said sum.

XII. That in view of the said opinion so expressed by the said Feltenstein as aforesaid, and of his lack of confidence in the claim of the said Kaupis, and of his lack of ability to appreciate the gravity and seriousness of said claim, this defendant stated and represented to the said Feltenstein, that he, the said Feltenstein ought not to act further as counsel for the said Kaupis, or present the claim of the said Kaupis upon the trial of the said action and requested him, the said Feltenstein and his co-partner, the plaintiff Rosenstein, to retire as counsel in said action, and to return the papers therein, to the defendant, in order that he might consult and advise with and pro-

cure other counsel to act for and on behalf of, and to represent the said Kaupis.

[On margin:] O. K. J. A. McC.

XIII. That thereupon the said Feltenstein refused to further act or permit his firm to act as counsel for the plaintiffs in any of the defendant's actions, including the two actions before mentioned and described; but refused to retire as such counsel in said actions, or to return the papers therein, in the possession of the plaintiffs, to the defendant, unless this defendant agreed to make good
197 and pay to the plaintiffs, all of the compensation so agreed to be paid to them by the defendant as aforesaid, and threatened to take such proceedings against this defendant as would compel compliance with said demand.

XIV. That under compulsion of such threat, and in order that this defendant, in the fulfillment of the duties which he owed to the plaintiffs in said actions, might procure the return of said papers so as to continue with the further and proper prosecution and management thereof, and without hinderance or interference of the plaintiffs, might procure the employment, aid and advice of other counsel, in the place and stead of the plaintiffs herein, this defendant, at the suggestion, procurement, insistance and compulsion of the plaintiffs, made and entered into the alleged agreement, dated, May 4, 1914, set forth in paragraph "4" of the plaintiffs' complaint, and upon which their first alleged cause of action is based.

XV. That the said alleged agreement was made and entered into by the defendant as aforesaid, under duress and upon the suggestion, procurement and insistance of the plaintiffs, and under compulsion of their threats; and the said alleged agreement and each and every promise on the part of the defendant therein contained, including the promise by this defendant to pay to the said Feltenstein, the sum of One thousand ($1,000) Dollars, was therefor- made and given without any consideration therefor.

And as and for a partial defense to the alleged cause of action set forth in the second cause of action of the plaintiffs' complaint, this defendant alleges;

[On margin:] O. K. J. A. McC.

XVI. That prior to the institution of this action, this defendant duly tendered to the plaintiffs the sum of Two Hundred ($200) Dollars, in full satisfaction and payment of the amount demanded in said cause of action; but that the plaintiffs refused to ac-
198 cept the same; and this defendant hereby continues the said tender, and offers to allow the same to be deducted from the amounts claimed to be due to him from the plaintiffs, as hereinafter set forth in the counterclaims in this answer.

And as and for a separate and distinct defense to the alleged cause of action set forth in the third cause of action of plaintiffs' complaint, this defendant alleges:

XVII. That the sum of One Hundred ($100) Dollars, claimed in said cause of action, and alleged to have been loaned in advance

to the defendant by the plaintiffs, on or about July 30, 1914, as well as any and all other moneys loaned and advanced to the defendant by the plaintiffs, on or about said dates, have been repaid to the plaintiffs by defendant, and have been fully and wholly discharged and satisfied.

And as and for a first counter-claim, and by way of set-off to any moneys to which the plaintiffs may be entitled, this defendant alleges:

XVIII. That at all of the times hereinafter mentioned, the above named plaintiffs were and still are attorneys and counsellors at law, duly admitted to practise in all the Court- of this State, and at all the times hereinafter mentioned were and still are co-partners, practising law under the firm name of Feltenstein & Rosenstein.

XIX. That at all times hereinafter mentioned the above named defendant was an attorney and counsellor at law, duly admitted to practice in the United States District Court, Eastern District of New York.

[On margin:] O. K. J. A. McC.

XX. That prior to the 4th day of May, 1914, the defendant made and entered into an agreement with the plaintiffs wherein and whereby the defendant hired and employed the plaintiffs to act as counsel for him, in the conduct of two certain cases, then pending in the District Court of the United States, for the Eastern District of New York, entitled Annie Yanulionis vs. Interborough
199 Rapid Transit Company, and Frank Kaupis vs. Arbuckle Brothers, in which said actions the defendant appeared as attorney of record for the plaintiffs, and which are the same actions mentioned and described in the first cause of action of plaintiffs' complaint; and wherein and whereby the plaintiffs promised, undertook and agreed to act as such counsel, and to the best of their skill and ability to render and perform professional services as attorneys and counsellors-at-law, in the proper conduct and management of said actions, including the making, prosecution or defense of each and every motion, step or proceeding that might be had or taken therein and the preparation of said actions for trial, the attendance by them in Court whenever said actions appeared upon the trial or other calendars of said Court, the appearance at and trial of said actions by the plaintiff, Moses Feltenstein, the production, offering, making and adducing of all and any proofs and evidence for the proper, full and complete presentation of the claims of the plaintiffs in said action, the taking, prosecution or defense of any and all appeals or proceedings subsequent, as well as prior to the entry of judgments in said actions, and in each and every respect, and undertook to perform and render such services until and including the final determination of said actions; in consideration whereof, and of the services so to be rendered by the plaintiffs as aforesaid, the defendant promised, undertook and agreed to pay to the plaintiffs, a designated sum of money, out of his fees upon the collection of such judgments from the defendants in said actions.

[On margin:] O. K. J. A. McC.

XXI. That thereafter and prior to the time that said actions were reached upon the calendar of said Court for trial and before the execution of the alleged agreement set forth in paragraph "4" of the plaintiffs' complaint, the plaintiff, Moses Feltenstein, acting for and on behalf of himself and his co-partner, the plaintiff, Abraham Rosenstein, stated and represented to the defendant that he was intimately acquainted with one of the attorneys for the defendant in the said action of Kaupis vs. Arbuckle Brothers, which was an
200 action brought to recover damages for personal injuries sustained by the said Kaupis, through the negligence of the defendants in said action, and that by reason of such acquaintance, he was able to bring about the settlement of said action.

XXII. That the said plaintiff further stated and represented to the defendant, that he was able to procure the payment by the defendants to the said Kaupis of a couple of thousand dollars, perhaps Three Thousand ($3,000) Dollars, in settlement of said action, and recommended and advised the defendant to accept such settlement, and sought to induce and prevail upon the defendant so to do. That the defendant advised the said Feltenstein that the said proposed settlement, was in the opinion of defendant, entirely inadequate and insufficient, that the defendant would not accept such offer, nor would he advise or recommend the said Kaupis to accept the same. That the defendant therefore advised the said Feltenstein, that in the opinion of defendant, the plaintiff in said action, the said Kaupis, was entitled to receive a large and substantial sum of money as compensation for the injuries sustained by him, and that the defendant would not advise or recommend nor accept a sum less than Fifteen Thousand ($15,000) Dollars, in settlement of said action. That thereupon the said Feltenstein ridiculed the opinion and statement so made by the defendant, and stated and represented to the defendant, and gave it as his opinion, that upon the trial of said action, and by way of any verdict, that the plaintiff, said Kaupis might recover therein, a larger sum than the amount which had been stated by him to have been offered in settlement would not be awarded, and that in his opinion, the injuries sustained by the said Kaupis were not worth more than said sum.

[On the margin:] O. K. J. A. McC.

XXIII. That in view of the said opinion so expressed by the said Feltenstein as aforesaid, and of his lack of confidence in the claim of the said Kaupis, and of his lack of ability to appreciate the
201 gravity and seriousness of said claim, this defendant stated and represented to the said Feltenstein, that he, the said Feltenstein ought not to act further as counsel for the said Kaupis, or present the claim of the said Kaupis upon the trial of said action, and requested him, the said Feltenstein and his co-partner, the plaintiff Rosenstein, to retire as counsel in said action, and to return the papers therein, to this defendant, in order that he might consult and advise with and procure other counsel to act for and on behalf of, and to present the said Kaupis.

XXIV. That thereupon the said Feltenstein refused to further

act or permit his firm to act as counsel for the plaintiffs in any
the defendant's actions, including the two actions, before mentione
and described; but refused to retire as such counsel in said action
or to return the papers therein, in the possession of the plaintiffs,
the defendant, unless this defendant agreed to make good and pay
the plaintiffs, all of the compensation so agreed to be paid to them b
the defendant as aforesaid, and threatened to take such proceedin
against this defendant as would compel compliance with said d
mand.

XXV. That under compulsion of such threat, and in order th
this defendant, in the fulfillment of the duties which he owed
the plaintiffs in said actions, might procure the return of said p
pers so as to continue with the further and proper prosecution an
management thereof, and without hindrance or interference
the plaintiffs, might procure the employment, aid and advice of oth
counsel, in the place and stead of the plaintiffs herein, this defen
ant, at the suggestion, procurement, insistence and compulsion
the plaintiffs, made and entered into the alleged agreement, date
May 4, 1914, set forth in paragraph "4" of the plaintiffs' complain
and upon which their first alleged cause of action is based.

[On the margin:] O. K. J. A. McC.

XXVI. That the said alleged agreement was made and entere
into by the defendant as aforesaid, under duress and upo
202 the suggestion, procurement and insistence of the plaintiff
and under compulsion of their threats; and the said allege
agreement and each and every promise on the part of the defendan
therein contained, including the promise by this defendant to pa
to the said Feltenstein, the sum of One Thousand ($1,000) Dollar
was therefor- made and given without any consideration therefor.

XXVII. That thereafter, this defendant did procure, hire, emplo
and retain other counsel for the said Kaupis, in the place and stea
of the plaintiffs herein, to do, render and perform, the services whic
they had agreed to render and perform, and was necessarily com
pelled to pay such other counsel for his said services; and the sai
action of Kaupis vs. Arbuckle Brothers, was thereafter reached fo
trial, and was actually tried, and during the course of such trial, wa
settled by the payment by the defendant in said action, to sai
Kaupis, of the sum of Twelve Thousand ($12,000) Dollars.

XXVIII. That after the making of such settlement, and upo
receipt by this defendant of his fees as attorney for the said Kaupi
the plaintiffs herein, under color of said alleged agreement of Ma
4, 1914, procured and induced this defendant to pay to them the su
of Five Hundred ($500) Dollars.

XXIX. That as aforesaid, the said alleged agreement of May
1914, and the promises on the part of this defendant therein co
tained, were wholly without any consideration therefor; and th
the said payment by this defendant to the plaintiffs, of the said su
of Five Hundred ($500) Dollars, under color of said agreemer
and in pretended compliance therewith, was made without any co

sideration whatsoever, and this defendant is entitled to the return thereof from the plaintiffs.

[On the margin:] O. K. J. A. McC.

XXX. That by reason of the premises, the plaintiffs are indebted to the defendant in the sum of Five Hundred ($500) Dollars.

203 And as and by way of a further and second counterclaim, this defendant alleges:

XXXI. That he reiterates and re-alleges each and every the allegations contained in the paragraphs or subdivisions of this answer, respectively marked and designated "17 and 18," as though the same were herein fully and at length set forth,

XXXII. That heretofore and prior to the commencement of this action, the defendant made and entered into an agreement with the plaintiffs, wherein and whereby the defendant hired and employed the plaintiffs to act as counsel for him, in the conduct of a certain action, entitled Frank Kaupis vs. Arbuckle Brothers, then pending and undetermined in the District Court of the United States, for the Eastern District of New York, wherein this defendant appeared as attorney of record for the plaintiff, and wherein and whereby the plaintiffs promised, undertook and agreed to act as such counsel, and to the best of their skill and ability, to render and perform professional services as such attorneys and counsellors-at-law, in the proper conduct and management in said action, including the making, prosecution and defense of each and every motion, step or proceeding that might be had or taken therein, the preparation of said action for trial, the attendance by them in Court whenever said action appeared upon the trial or other calendars of said Court, the appearance at and trial of said action by the plaintiff, Moses Feltenstein, the production, offering, making and adducing by him of all and any proofs and evidence, for the proper, full and complete presentation of the claim of the plaintiff in said action, the taking, prosecution or defense of any and all appeals and proceedings subsequent as well as prior to the entry of judgment in said action, and in each and every matter and thing, to perform and render such services until the final determination of said action; in consideration thereof, and of the services so to be rendered by the plaintiffs aforesaid, the

204 defendant promised, undertook and agreed to pay to the plaintiffs, a designated sum of money, out of the fees received by him in said action.

[On the margin:] O. K. J. A. McC.

XXXIII. That in violation of said agreement, the plaintiffs hereafter wholly failed, neglected and refused to carry out and perform all or any of the terms and conditions of said agreement on their part, and failed, neglected and refused to render and perform said services as counsel, or to conduct and manage the said action, or to prepare the same for trial, or to attend in Court when the same appeared upon the calendar thereof; and the plaintiff, Moses Feltenstein, wholly failed, neglected and refused to attend and appear at the trial of said action, or to try the same as counsel for the plaintiff therein,

or to produce, offer, make and adduce, all or any of the proofs and evidence for the proper, full and complete presentation of the claim of the plaintiff therein; and the plaintiffs in each and every respect violated and repudiated their said agreement, although this defendant at all times was ready, able and willing to carry out and perform the terms and conditions of said agreement on his part, and duly offered so to do; and that by reason of the plaintiffs' failure, neglect and refusal to carry out and perform the said agreement, and on account of their violation and repudiation thereof, this defendant was necessarily compelled to and did hire and employ other persons to render and perform the services which the plaintiffs had in and by their said agreement, promised and undertaken to perform.

XXXIV. That by reason of the premises, this defendant was deprived of the services of the plaintiffs, and of the value and benefit thereof.

[On margin:] O. K. J. A. McC.

XXXV. That the fair and reasonable value of the services of the plaintiffs, which they failed, neglected and refused to render as aforesaid, and of the benefit and value whereof this defendant was
205 deprived, was Eighty-eight Thousand ($88,000) Dollars; and this defendant was damaged in the further sum of Three Thousand ($3,000) Dollars, the fair and reasonable value of the services of the persons whom this defendant was necessarily compelled to hire and employ to do and perform the services which the plaintiffs had agreed to render

XXXVI. That by reason of the premises, this defendant has been damaged in the sum of Ninety-one Thousand ($91,000) Dollars.

And as and by way of a further and third counterclaim, this defendant alleges:

XXXVII. That he repeats and re-alleges each and every the allegations contained in the paragraphs or subdivisions of this answer, respectively marked and designated "17 and 18" as though the same were herein fully and at length set forth.

XXXVIII. That heretofore and prior to the commencement of this action, the defendant made and entered into an agreement with the plaintiffs, wherein and whereby the defendant hired and employed the plaintiffs to act as counsel for him, in the conduct of two certain cases, then pending in the District Court of the United States, Eastern District of New York, entitled Annie Yanulionis vs. Interborough Rapid Transit Company and Marcel Ackalitis vs. Philadelphia & Reading Coal & Iron Company, in which said actions the defendant appeared as attorney of record for the plaintiffs.

[On margin:] O. K. J. A. McC.

XXXIX. That in violation of said agreement, the plaintiffs thereafter wholly failed, neglected and refused to carry out and perform all or any of the terms and conditions of said agreement on their part, and failed, neglected and refused to render and perform said services as counsel or to conduct and manage the said action, or

prepare the same for trial, or to attend in Court when the same appeared upon the calendar thereof; and the plaintiff, Moses Feltenstein wholly failed, neglected and refused to attend and appear at the trial of said action or to try the same as counsel for the
206 plaintiffs therein, or to produce, offer, make and adduce all or any of the proofs and evidence for the proper, full and complete presentation of the claims of the plaintiffs therein; and the plaintiffs in each and every respect, violated and repudiated their said agreement, although this defendant at all times was ready, able and willing to carry out and perform the terms and conditions of said agrement on his part, and duly offered so to do; and that by reason of the plaintiffs' failure, neglect and refusal to carry out and perform the said agreement, and on account of their violation and repudiation thereof, this defendant was necessarily compelled to and did hire and employ other persons to render and perform the services which the plaintiffs had in and by their said agreement promised and undertaken to perform.

XL. That by reason of the premises, this defendant was deprived of the services of the plaintiffs, and of the value and benefit thereof.

XLI. That the fair and reasonable value of the services of the plaintiffs, which they failed, neglected and refused to render as aforesaid, and of the benefit and value whereof this defendant was deprived, was Ninety Thousand ($90,000) Dollars; and this defendant was damaged in the further sum of Fourty-five Hundred ($4,500) Dollars, the fair and reasonable value of the services of the persons whom this defendant was necessarily compelled to hire and employ, to do and perform the services which the plaintiffs had agreed to render.

XLII. That by reason of the premises, this defendant has been damaged in the sum of Ninety-four Thousand and Five Hundred ($94,500) Dollars.

XLIII. Upon information and belief, that the plaintiffs in this action, Moses Feltenstein and Abraham Rosenstein, at all of the times, and before the commencement of this action, and at the time of the commencement thereof, and at all the times since then, were and now are citizens and residents of the State of New York.

[On margin:] O. K. J. A. McC.

207 XLIV. That the defendant in this action, at all times above mentioned, was and now is a citizen and resident of the State of New Jersey.

XLV. That all the damages alleged in the counterclaim and counterclaims to this action, and all the moneys, alleged to be due to the defendant from the plaintiffs, accrued and became due to the defendant, prior to the commencement of this action by the plaintiffs herein.

Wherefore, this defendant demands judgment, dismissing the plaintiffs' complaint, and in his favor and against the plaintiffs, for

the sum of One Hundred and Eighty-six Thousand ($186,000) D
lars, besides the costs and disbursements of this action.

EDWARD G. DELANEY,
Attorney for Defendant

154 Nassau Street, Borough of Manhattan, City of New York.

A copy.
[Seal City Court of the City of New York.]
THOMAS F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series
1914, canceled F. 10, '16. City Court, New York.]

[On margin:] O. K. J. A. McC.

208 STATE OF NEW YORK,
City of New York,
County of New York, ss:

Baltrus S. Yankaus being duly sworn, deposes and says; that
is the defendant in the within entitled action. That he has r
the foregoing answer and counterclaims and knows the conte
thereof, and the same is true of his own knowledge, except as to
matters therein stated to be alleged upon information and bel
and as to those matters, he believes them to be true.

BALTRUS S. YANKAUS

Sworn to before me this 8th day of November, 1915.
[NOT. SEAL.]
MORRIS BLAU,
Notary Public, New York Co

209 [Endorsed:] United States District Court, Southern D
trict of New York. Moses Feltenstein and Abraham Rost
stein Plaintiffs, against Baltrus S. Yankaus, Defendant. Copy. A
swer. Edward G. Delaney, Attorney for defendant, 154 Nassau St
Borough of Manhattan, City of New York.

210–212 UNITED STATES OF AMERICA,
County of New York, ss:

I, Thomas F. Smith, Clerk of the City Court of the City of N
York of the State of New York, by virtue of the foregoing wri
error, in obedience thereto, do hereby certify that the *following* p
numbered from one (1) to two hundred and nine (209), inclu
contain a true and complete transcript of the record and proceed
had in said Court in the cause of Moses Feltenstein and Abra
Rosenstein, Plaintiffs, against Baltrus S. Yankaus, Defendant,
in the proceedings upon the motion to set aside the judgment in
same, as the same are made a record of and on file in the Clerk's o
of said Court.

In testimony whereof, I have caused the seal of said Court t
hereunto affixed in the City of New York, in the County and S

of New York, on the 26 day of February, in the year of our Lord One Thousand Nine Hundred and Sixteen, and of the Independence of the United States the One Hundred and Fortieth.

[Seal City Court of the City of New York.]

THOMAS F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, canceled F. 26, '16. City Court, New York.]

213 *Opinion of Hough, J.*

District Court of the United States, Southern District of New York.

MOSES FELTENSTEIN *et al.*
vs.
BALTRUS S. YANKAUS.

Action at Law—Motion to Remand to the City Court of New York.

Mr. Zipris for plaintiff- and motion.
Mr. Delaney for defendant, opposed.

Memorandum.

When this matter was argued the record on removal was not in Court. If it had been the motion would not have been held until now. The opinion of Judge Lacombe in Crane Co. vs. Guanica Centrale, 132 Fed. Rep., 713, merely states what for many previous years had been the practice of this Court,—i. e. doubtful cases were always remanded.

214 Rulings of this nature are admittedly unsatisfactory. Counsel and parties are entitled to a clear-cut statement of the law if it is possible to make one;—and it would seem as if the removal acts were sufficiently old by this time to enable a Court to select what appeared to be the best of conflicting rules.

Since no case (irrespective of amount involved) can be removed over which the United States Court might not have had original jurisdiction, it has always seemed to me illogical to consider a counterclaim in ascertaining the propriety of removal or remand.

In the State of New York there is no compulsion on a defendant to set up a counterclaim. It is always optional with the party possessing it to reserve his affirmative demand for an independent suit.

Imagine this action brought originally in this Court; the defendant would only have been obliged to appear and move on the pleadings to dismiss the complaint without prejudice. Such a motion would have been granted as of course.

Thus it appears that an action of the most trifling nature may (under defendant's contention) be removed to this Court at the option of defendant if he can assert a counterclaim of sufficient size.

That this was never the intent of the statute I am clear. Considering, however, the confusion of decisions and (so far as
215 know) the failure of late years to observe the difference between the Act of 1875 and that of 1888, I should have felt impelled to consider and classify decisions were it not for the consideration next to be stated. If it be true that by a preponderance of rulings the affirmative claims set up in an answer are to be considered in determining jurisdiction, it is at least necessary that somewhere and in some shape the defendant who sets up counterclaim shall plead them in a manner which enables his opponent to criticise them modify them or expunge them as may be proper under the rules of good pleading.

In this case,—and in any similar case under the *the* Act of 188 there is no answer. The only knowledge that to this moment plaintiff- *has* regarding defendant's counterclaim is contained in the petition for removal,—the language of which petition sets forth no reason whatever for the recovery by the defendant from the plaintiff- of any sum of money at all. The petition says in substance that the defendant has a counterclaim, without stating what it is. Whatever may be the preferred rule, when in a proper and formal manner the amount in controversy between the parties is made to appear as shown to exceed $3,000 exclusive of interest and costs;—I feel justified in holding, and do hold, that it is impossible to show that such controversial amount exists in any such manner as this defendant has attempted.

For this reason the motion to remand is granted, with $20 costs.

C. M. HOUGH, *D. J.*

Nov. 15, 1915.

216 City Court of the City of New York.

Opinion of Schmuck, J., in N. Y. L. J., Dec. 4th, 1915.

FELTENSTEIN v. YANKAUS.—Motion denied. The matter has virtually been decided by Mr. Justice La Fetra. Accepting and agreeing with his view of the law, the Court determined that the judgment was properly taken. Order signed.

Filed Dec. 3, 1915.

[Endorsed:] 1510/1916.

217 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the Chief Justice and Justices of the City Court of the City of New York, of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea, which is in the City Court of the City of

New York, of the State of New York, before you, or some of you, between Moses Feltenstein and Abraham Rosenstein, plaintiffs, against Baltrus S. Yankaus, defendant, and also in the rendition of a judgment and plea on a motion to vacate the same a manifest error has happened to the great prejudice of the said Baltrus S. Yankaus, defendant, as is said and appears in his complaint; we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, on the 11th day of February, in the year of our Lord One Thousand Nine Hundred and Sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by:
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.
Feb. 11, 1916.

218 [Endorsed:] Clerk's Index No. —. Year —. Supreme Court of the United States. Baltrus S. Yankaus, Plaintiff in Error, against Moses Feltenstein and Abraham Rosenstein, Defendants in Error. Original. Writ of Error. Roger Foster, Attorney for Plaintiff in Error, 55 Liberty Street, Borough of Manhattan, New York. Due and timely service of a copy of the within — is admitted this — day of ——, 191–. Let the writ issue. Washington, D. C., Feb. 11/1916. Charles E. Hughes, Associate Justice of the U. S. Supreme Court.

219 UNITED STATES OF AMERICA, *ss:*

To Moses Feltenstein and Abraham Rosenstein, Greeting:

You are hereby cited and admonished, to be and appear, at a Supreme Court of the United States, at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error, filed in the office of the Clerk of the City Court of the City of New York, of the State of New York, wherein Baltrus S. Yankaus was plaintiff in error and you were defendants in error, to show cause, if any there be, why the judgment rendered against

the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this 11th day of February, in the year of our Lord one thousand nine hundred and sixteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. Baltrus S. Yankaus, Plaintiff in Error, against Moses Feltenstein and Abraham Rosenstein, Defendants in Error. Original. Citation. Roger Foster, Attorney for Plaintiff in Error, 55 Liberty Street, New York.

220 Supreme Court of the United States.

BALTRUS S. YANKAUS, Plaintiff in Error,
against
MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Defendants in Error.

UNITED STATES OF AMERICA,
Southern District of New York,
City of New York, ss:

Ona Roder, being duly sworn, says:

That she is of full age.

That on the 17th day of February, 1916, she served notice, Writ of Error, Citation and Supersedeas Bond herein, on Moses Feltenstein, one of the defendants-in-error herein, at his office and Post Office Address, No. 309 Broadway, Borough of Manhattan, City of New York, by delivering to and leaving personally with said Moses Feltenstein, a true and correct copy of said notice, Writ of Error, Citation and Supersedeas Bond herein.

That she knew the person so served to be the same persons mentioned and described as Moses Feltenstein, one of the defendants-in-error herein.

ONA RODER.

Sworn to before me this 19th day of February, 1916.

[Seal Edward G. Delaney, Notary Public, New York Co.]

E. G. DELANEY,
Notary Public, Kings Co. (160).

Cert. filed in New York Co. (203).

221 Supreme Court of the United States.

BALTRUS S. YANKAUS, Plaintiff in Error,
against
MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Defendants in Error.

UNITED STATES OF AMERICA,
Southern District of New York,
City of New York, ss:

Ona Roder, being duly sworn, says:

That she is of full age.

That on the 17th day of February, 1916, she served notice, Writ of Error, Citation and Supersedeas Bond herein, on Abraham Rosenstein, one of the defendants-in-error herein, at his office and Post Office Address, No. 309 Broadway, Borough of Manhattan, City of New York, by delivering to and leaving personally with said Abraham Rosenstein, a true and correct copy of said notice, Writ of Error, Citation and Supersedeas Bond herein.

That she knew the person so served to be the same person mentioned and described as Abraham Rosenstein, one of the defendants-in-error herein.

ONA RODER.

Sworn to before me this 19th day of February, 1916.

[Seal Edward G. Delaney, Notary Public, New York Co.]

E. G. DELANEY,
Notary Public, Kings Co. (160).

Cert. filed in New York Co. (203).

222 To the Honorable Edward D. White, Chief Justice of the United States, and to the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, and to the Other Justices of said Honorable Court, and to the Honorable the Supreme Court of the United States:

The petition of Baltrus S. Yankaus, who resides in the Town of Alpine, County of Bergen, State of New Jersey, respectfully shows:

1. Heretofore and on or about the 11th day of October, 1915, an action was begun in the City Court of the City of New York, by Moses Feltenstein and Abraham Rosenstein, who then were and still are citizens and residents of the Borough of Manhattan, City, County and State of New York, as plaintiffs, against your petitioner, who then was and still is a citizen and resident of the State of New Jersey, as defendant. Subsequently, on or about October 15th, 1915, your petitioner, the defendant in said action, by his attorney, duly notified the attorney for the plaintiffs in said action that a petition and bond for a removal of said cause to the District Court of the United

States, for the Southern District of New York, would be filed in the office of the Clerk of said City Court on the 16th day of October, 1915, and before the time to answer, plead or demur to the complaint in said action had expired, in accordance with the statutes of the United States in such case made and provided, a petition for the removal of said cause to the District Court of the United States, for the Southern District of New York, was duly filed by your petitioner in the office of the Clerk of said City Court, and, at the same time, a bond was then duly filed by your petitioner, which bond was for the payment of $500, in case your petitioner should not enter in the District Court of the United States, for the Southern District of New York, within thirty days from the date of filing said petition, a certified copy of the record in said case, and in case he should
223 not pay all costs awarded by said District Court, should said District Court hold that said suit was wrongfully or improperly removed thereto, and also in case he failed to appear and enter special bail in said suit if special bail was originally requisite therein. The said bond was on the same day, October 16th, 1915, duly approved by a Justice of said City Court and was also duly approved by said City Court of the City of New York.

The amount involved in said suit was more than $300, exclusive of interest and costs, and a counterclaim for more than said amount was duly made by your petitioner.

Your petitioner is informed and believes that upon the filing of said petition and bond, the said case was duly removed to said District Court of the United States, for the Southern District of New York, and the jurisdiction of the said City Court of the City of New York over the same thereupon ceased and terminated.

Subsequently, on the 25th day of October, 1915, against the opposition of your petitioner, who appeared by an attorney in opposition to a motion for the same, a paper purporting to be an order was entered and filed in the Clerk's office of said City Court at the direction of Mr. Justice La Fetra, a Justice thereof, which order contained the following language:

"It is ordered that the removal or attempted removal of this action to the District Court of the United States in and for the Southern District of New York, be set aside, and this Court does hereby determine that this action is not one entitled to be removed to said Court, and that this Court hereby declares that this action is and was not properly removable to the said District Court of the United States and this Court does continue to retain jurisdiction of this action as though such removal had not been attempted or made."

Thereafter, upon October 26th, 1915, a judgment was entered in the Clerk's office of the said City Court of the City of New York, in favor of the plaintiffs and against said defendant, for the sum of $882.78, because of the failure of this defendant to appear and answer in the City Court in said action. At the time said judgment was entered, the said case was no longer pending in said City
224 Court and thirty days since the time of said removal had not expired. Thereupon, on or about November 5th, 1915, your petitioner duly appealed from said judgment and from said paper

purporting to be an order to the Appellate Term of the Supreme Court of the State of New York, for the First Department. Thereafter, said appeal came on for argument before said Appellate Term of said Supreme Court and was duly argued there by and on behalf of your petitioner, who then insisted, in support of said appeal, that said judgment and the said paper purporting to be an order, and each of them, was and were void and unauthorized and erroneous, for the reason, amongst other things, that at the time said paper, purporting to be an order was entered and at the time said judgment was entered, the said action was not pending in said City Court, but had been removed to the said District Court of the United States and was pending in said latter Court, which alone had jurisdiction over the same; but the said order was affirmed with costs by said Appellate Term, and the appeal from said judgment was dismissed with costs by said Appellate Term, on or about December 13th, 1915, and an order and judgment entered accordingly against your petitioner for the sum of $20 costs and disbursements. An application was then made by your petitioner to said Appellate Term for leave to appeal to the Appellate Division of the Supreme Court, for the First Department, from said order and judgment of said Appellate Term, which was then denied with $10 costs. Thereafter, your petitioner applied to a Justice of said Appellate Division for leave to appeal to said Appellate Division from the order and judgment of the Appellate Term, as aforesaid. Thereafter, on or about January 28, 1916, said Justice thereof signed an order, that day entered, denying the right of your petitioner to appeal from said judgment. The remittitur was sent from said Appellate Term to the Clerk's office of the City Court of the City of New York, and on or about December 17th, 1915, an order was entered in the office of the Clerk of
225 said City Court making the judgment of said Appellate Term the judgment of said City Court. On or about December 3rd, 1915, your petitioner duly moved at a Special Term of said City Court, for an order setting aside said judgment entered in the office of the Clerk thereof, on or about October 26th, 1915, upon the ground, amongst other grounds, that said City Court had no jurisdiction and no power to enter said judgment and that said judgment was erroneous because when the same was entered the action wherein the same was entered was not pending in said City Court but had been duly removed to the said District Court of the United States. Said motion made by your petitioner as aforesaid was denied by said City Court, and at the direction of Mr. Justice Schmuck of said Court, an order denying the same was filed and entered in the office of the Clerk of said City Court, on or about December 3rd, 1915. Thereupon your petitioner duly appealed to said Appellate Term from said order denying said motion last described. Said Appellate Term refused to hear the said appeal; but on or about December 31st, 1915, upon the motion of the said plaintiffs, respondents, against the opposition and objection of your petitioner, said Appellate Term entered in the Clerk's office thereof an order dismissing said appeal, upon the ground that the questions therein involved had become academic because of the previous affirmance of

said paper purporting to be an order made and entered in said City Court at the direction of Mr. Justice la Feltra. A motion for leave to appeal from said order to said Appellate Division was denied by the Presiding Justice of said Appellate Division in an order then entered in the office of the Clerk thereof on January 28th, 1916.

The said Appellate Term is the highest Court of the State of New York to which your petitioner at the times hereinbefore mentioned had the right to appeal from said judgment and to
226 which your petitioner had the right to appeal from each and any of said orders, except upon special leave from a Justice of said Appelate Division, applications for which special leave were made as aforesaid, but which were denied as aforesaid.

II. Upon each of said motions and upon the entry of each of said judgments and orders, and upon each of said appeals, your petitioner was denied a title, right, privilege and immunity held and then asserted by your petitioner under the Constitution of the United States, Fourteenth Amendment, Section 1 thereof, and under the United States Constitution, Fifth Amendment, and the statutes of the United States (Judicial Code, Sections 28 and 29, and other statutes).

Wherefore your petitioner prays that a writ of error may issue and that he may be allowed to bring up for review before the Supreme Court of the United States, the said paper purporting to be an order filed and entered in the office of the Clerk of the City Court of the City of New York at the direction of Mr. Justice La Fetra on October 25th, 1915, and the said judgment of the said City Court filed and entered in the office of the Clerk thereof on October 26th, 1915, and the said order entered at the direction of Mr. Justice Schmuck in the office of the Clerk of said City Court on the 3rd day of December, 1915, and the said orders and judgments of the Appellate Term of the Supreme Court of the State of New York, for the First Department, respectively entered on December 13th, 1915, and December 31st, 1915, and the said order entered in the office of the Clerk of said City Court at the direction of Mr. Justice Schmuck on December 17th, 1915; and for a review of all the proceedings to enforce and any proceedings to set aside the judgment entered in said action as aforesaid; with costs; and for such other and further relief in the premises as may be just.

227 Dated, New York, February 10th, 1916.

BALTRUS S. YANKAUS,
Petitioner.

ROGER FOSTER,
His Attorney.

55 Liberty Street, Borough of Manhattan, New York.

COUNTY OF NEW YORK, *ss*:

Baltrus S. Yankaus, being duly sworn, deposes and says: I have read the foregoing petition and know the contents thereof. The same is true to my own knowledge, except as to the matters therein stated

to be alleged upon information and belief, and as to those matters I believe the same to be true.

BALTRUS S. YANKAUS.

Sworn to before me this 10th day of Feb., 1916.

[Seal of Florence Levien, Notary Public, Kings County.]

FLORENCE LEVIEN,
Notary Public.

Kings County No. 24. Certificate filed New York County No. 38. New York Register No. 6101.

[Endorsed:] Supreme Court of the United States. Baltrus S. Yankaus, Plaintiff in Error, against Moses Feltenstein and Abraham Rosenstein, Defendants in Error. Original Petition for Writ of Error. Roger Foster, Attorney for Plaintiff in Error, 55 Liberty Street, New York. Let the Writ issue. Washington, D. C., Feb. 11, 1916. Charles E. Hughes, Associate Justice of the Supreme Court of the United States.

228 Supreme Court of the United States.

BALTRUS S. YANKAUS, Plaintiff in Error,
against
MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Defendants in Error.

And now comes Baltrus S. Yankaus, plaintiff in error, and prays for a reversal of the judgment and order of the Appellate Term of the Supreme Court of the State of New York, for the First Department, in the action brought by Moses Feltenstein and Abraham Rosenstein, plaintiffs, respondents, against Baltrus S. Yankaus, defendant, appellant, which judgment was entered in the office of the Clerk of said Appellate Term on or about the 13th day of December, 1915, which judgment and order of said Appellate Term affirmed an order of the City Court of the City of New York entered at the direction of Mr. Justice La Fetra on or about October 25th, 1915, and dismissed the appeal of said plaintiff in error from a judgment entered in the office of the Clerk of said City Court on or about October 26th, 1915; and he also prays for a reversal of an order and judgment of said City Court; and he also prays for a reversal of the judgment and order of said Appellate Term entered in the office of the Clerk thereof on or about December 31st, 1915, which dismissed his appeal from an order of said City Court entered at the direction of Mr. Justice Schmuck on or about December 3rd, 1915; and he also prays the reversal of the said order last described; and he also prays a reversal of each and all of the orders of said City Court which made said orders and judgments of said Appellate Term the judg-

ments and orders of said City Court, as aforesaid, and al
229 which were made in proceedings to enforce said judgments.
Dated, New York, February —, 1916.

BALTRUS S. YANKAUS,
Plaintiff in Error,
By ROGER FOSTER,
His Attorney, 55 Liberty Street, Borough of Manhattan, New York.

230 [Endorsed:] Clerk's Index No. —. Year —. Supreme Court of the United States. Baltrus S. Yankaus, Plaintiff in Error, against Moses Feltenstein and Abraham Rosenstein, Defendants in Error. Original prayer for reversal. Roger Foster, Attorney for Plaintiff in Error, 55 Liberty Street, Borough of Manhattan, New York.

231 City Court of the City of New York.

MOSES FELTENSTEIN, &c.,
against
BALTRUS S. YANKAUS.

CLERK'S OFFICE,
City Court of the City of New York:

I, Thomas F. Smith, Clerk of the City Court of The City of New York, having compared the annexed Bond on Supersedeas in the above-entitled action, with the original on file in this office, do certify that the same is a correct transcript therefrom and of the whole of said original.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the City Court of The City of New York, this 26 day of Feb. A. D. 1916.

[Seal City Court of the City of New York.]

THOMAS F. SMITH, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled F. 26, '16. City Court, New York.]

232 American Surety Company of New York.

Capital $5,000,000.

Company's Office Building, 100 Broadway, New York.

City Court of the City of New York.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Plaintiffs
against
BALTRUS S. YANKAUS, Defendant.

Know all men by these presents, That we, Baltrus S. Yankaus, of the Town of Alpine, County of Bergen, State of New Jersey, as Principal, and the American Surety Company of New York, 100 Broadway, City and State of New York, as Surety, are held and firmly bound unto Moses Feltenstein and Abraham Rosenstein in the full and just sum of fifteen hundred and 00/100 dollars ($1,500.00) to be paid to the said Moses Feltenstein and Abraham Rosenstein, their attorneys, executors, administrators and assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our respective individual and corporate seals and dated the 7th day of February, in the year of our Lord, one thousand nine hundred and sixteen.

Whereas, the said Baltrus S. Yankaus has applied for a Writ of Error to bring up to the Supreme Court of the United States for review a judgment of the City Court of the City of New York, of the State of New York, entered in favor of said Moses Feltenstein and Abraham Rosenstein against said Baltrus S. Yankaus on October 26th, 1915, for the sum of eight hundred eighty-two and 78/100 dollars, and an order entered in said City Court at the direction of Mr. Justice La Fetra on October 25th, 1915, which ordered that an attempted removal of the action in which said judgment was subsequently rendered to the District Court of the United States, for the Southern District of New York, be set aside and that said Court retain jurisdiction of said action as though such removal had not been attempted to be made; and an order and judgment of the Appellate Term of the Supreme Court of the State of New York, for the First Department, which affirmed said order entered at the direction of Mr. Justice La Fetra with costs and dismissed with costs an appeal taken by said plaintiff-in-error from the said judgment; and an order entered in the office of the Clerk of said City Court on or about December 17th, 1915, making the said judgment of said Appel-
late Term the judgment of said City Court; and all proceed-
233 ings in enforcement of said judgment, including an order of said City Court entered at the direction of Mr. Justice Schmuck, in the Clerk's office thereof on or about December 3rd, 1915, which denied a motion made by your petitioner for an order

setting aside said judgment; and an order of said Appellate Term entered on or about December 31st, 1915 which dismissed an appeal taken by said plaintiff-in-error from said order last described:

Now, therefore, the condition of this obligation is such, that if the above named Plaintiff-in-error Baltrus S. Yankaus, shall prosecute said Writ of Error to effect and if he fail to make his plea good, shall answer all damages and costs, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of

BALTRUS S. YANKAUS. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK,
By MARSHALL L. BROWER,
Resident Vice-President.

Attest:
[L. S.] LOUIS PAPEN,
Resident Assistant Secretary.

Approved February 11, 1916.
CHARLES E. HUGHES,
Associate Justice of Supreme Court of United States.

234 STATE OF NEW YORK,
County of New York, ss:

On this 7th day of Feb. 1916, *191–*, before me personally appeared Marshall L. Brower, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in The City of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with Louis Papen and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Louis Papen subscribed to the said instrument is in the genuine handwriting of the said Louis Papen and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Marshall L. Brower, Resident Vice President.

[L. S.] C. A. STUMPF,
Notary Public, New York County, No. 383.

New York Register's No. 7103.

Certificates filed in Bronx, Dutchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster and Westchester Counties.

Commission expires March 30th, 1917.

234 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 18, 1916, at eleven o'clock A. M.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 7, 1915, for the purpose of nominating * * * officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for

* * * * * * *

Place.	Resident vice-presidents.	Resident assistant secretaries.
New York, N. Y.	Marshall L. Brower.	Marshall L. Brower.
	A. E. Cotterell.	William H. Bishop.
	William M. Tomlins, Jr.	A. E. Cotterell.
	Lester S. Moore.	Charles S. Waterbury.
	William H. Bishop.	Daniel Stewart.
	George R. Crosby.	E. D. Sadler.
	W. H. E. Reinecke.	George R. Crosby.
		W. H. E. Reinecke.
		E. J. Sabater.
		Louis Papen.
		Harold R. Ward.
		Benjamin A. Willis.
		Robert L. Neptune.

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

* * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 22nd day of January, 1916.

[L. S.] (Signed) W. H. RILEY,
Assistant Secretary.

[On margin:] O. K. J. A. McC.

235 [Endorsed:] City Court of the City of N. Y. Moses Feltenstein and Abraham Rosenstein, Plaintiffs, against Baltrus S. Yankaus, Defendants. Copy Supersedeas Bond. Foster, 32 Liberty.

Endorsed on cover: File No. 25,174. New York City Court, New York City. Term No. 891. Baltrus S. Yankaus, plaintiff in error, vs. Moses Feltenstein and Abraham Rosenstein. Filed March 11th, 1916. File No. 25,174.

Supreme Court, U. S.
FILED
NOV 18 1916
JAMES D. MAHER
CLERK

NOTICE OF MOTION AND VERIFIED STATEMENT.

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 407.

BALTRUS S. YANKQUS,

Plaintiff in Error.

vs.

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN.

IN ERROR TO THE CITY COURT OF NEW YORK CITY, STATE OF NEW YORK.

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Notice of Motion.

Supreme Court of the United States

BALTRUS S. YANKAUS, Plaintiff in error, against MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN.	October Term, 1916. No. 407.
In error to the City Court of New York City, State of New York.	

SIR:

PLEASE TAKE NOTICE that on the annexed verified statement of facts, and the transcript of record herein, the undersigned will submit to the Supreme Court of the United States, at a Stated Term thereof, on Monday December 4 1916, at the Capitol, in the City of Washington, District of Columbia, on the opening of the Court on that day, or as soon thereafter as counsel can be heard, the motions of which the annexed are copies; and

the undersigned shall submit with said motions and in support of the same, the arguments annexed to said statement of facts.

Dated, City of New York, November 11, 1916.

Yours, &c.,

JACOB W. HARTMAN,
Attorney and of Counsel
for Defendants in error,
309 Broadway
City, County and State of New York.

To:

ROGER FOSTER, ESQ.,
Attorney for Plaintiff in error.
55 Liberty Street,
City of New York.

Motion.

IN THE SUPREME COURT OF THE UNITED STATES.

BALTRUS S. YANKAUS, Plaintiff in error, against MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN.	October Term, 1916. No. 407.
In error to the City Court of New York City, State of New York.	

NOW COMES, FELTENSTEIN and ABRAHAM ROSENSTEIN, defendants in error, by Jacob W. Hartman, their counsel and move this Court to dismiss and quash the paper purporting to be a writ of error herein, for want of jurisdiction, and upon other grounds:—and the said defendants in error also move this Court to affirm the judgment of the State Court herein, upon the ground that it is manifest that said paper purporting to be a writ of error herein was taken for delay only, and that the questions upon which it is claimed that the jurisdiction depends is so frivolous as not to need further argument; and in the event of a denial of that motion that this cause be advanced on the calendar because the only matters in issue concern the jurisdiction of the Court below, or that this cause be transferred to the summary docket.

JACOB W. HARTMAN,
Attorney and of Counsel
for Defendants in error,
309 Broadway,
City, County and State of New York.

Affidavit of Abraham Rosenstein.

IN THE SUPREME COURT OF THE UNITED STATES.

BALTRUS S. YANKAUS,
Plaintiff in error,

against

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN,
Defendant in error.

Southern District of New York, City and County of New York, ss.:

ABRAHAM ROSENSTEIN, being duly sworn, deposes and says: That he is a defendant in error herein. This application is made to dismiss a writ of error or affirm the judgment of the City Court and is based upon this affidavit as well as the printed transcript of record filed herein on March 11th 1916 as Number 407.

As is shown by said record, and briefly stated herein, this action was instituted in the City Court of the City of New York, which is a Court of limited jurisdiction whose power is limited to enter a judgment no greater than the sum of $2000.

Defendants in error began said action in said City Court against plaintiff in error herein, to recover the sum of $800,—$500 of which was on a special retainer for legal services under a written agreement, and $300 for two separate loans, each of such items being alleged under separate causes of action. (Transcript pp. 3-5-88). The time of defendant in that action, to answer

expired according to the rules of that Court on October 17th 1915. On October 15th 1915, defendant in that action served notice merely to the effect that a petition and bond for removal from the City Court to the Federal Court would be filed with the Clerk of said City Court on October 16th. (Transcript pp. 15-88). The petition and bond on removal are setforth in the printed transcript. (Transcript 10-14) Neither at that itme, nor even at the time that the record was sent to the Federal Court, had the defendants interposed any answer or defense to the action. Neither the petition nor the affidavit of the petitioner's attorney thereto attached discloses the nature of plaintiff's cause of action, nor the amount for which plaintiffs in that action demanded judgment, except a mere statement that plaintiffs cause of action was one at law. (Transcript p. 10.) The petition failed also to state the nature of the defense or counterclaim and in fact failed to state that any answer or response to the bill of complaint had been served but petitioner did say "that by way of his counterclaim which your petitioner claims exceeds the sum or value of $3000 exclusive of interest and costs and which your petitioner claims to be due and owing from said plaintiffs in the above entitled suit and that the matter in amount and dispute in the above entitled action exceeds the sum or value of $3000." (Transcript p. 11.)

No formal order of the City Court directing the removal of the case was entered, defendant therein apparently relying upon the fact that the mere filing of the defective and insufficient petition and bond had the effect of automatically removing the case to the United States District

Court. Plaintiffs in that action, feeling that the record on removal constituted by the summons, complaint, petition and bond failed to show the jurisdictional facts entitling the defendants in error herein a removal of the cause, made application to said City Court to set aside the said removal and that said City Court retain its jurisdiction of that action and to continue therewith as though no removal was had or made. That motion was heard and argued before Mr. Justice LaFetra of the said City Court the plaintiff in error herein appeared and opposed the same and contended on behalf of the sufficiency of the record on removal.

After due consideration, said Justice LaFetra granted the relief requested by defendants in error herein, requested said petition to set aside the pretended removal, declared that the City Court retain and continue jurisdiction of the action, and further found that the case was one that was not properly removable to the Federal Court. The said Justice handed down a written opinion to the effect that even were a counterclaim over $3,000 been interposed the amount thereof would be no guide to determine the "amount in controversy", but that the amount demanded in the complaint and for which defendants in error herein asked for judgment could only be considered. (Transcript p. 89). Plaintiff in error herein defaulting, in interposing a plea or answer defendants in error herein on Oct. 26th, 1915 entered a judgment in their favor which with costs aggregated $882.78. (Transcript p. 6-7)

Thereupon plaintiff in error herein about October 27th 1915, applied one of the Justices of the District Court of the United States for the South-

ern District of New York and secured an order returnable October 30th, 1915, directing that the judgment creditors show cause why they should not be enjoined from proceeding or prosecuting their judgment and that all proceedings, judgment and orders entered and had in that section since the plaintiff in error herein had filed the bond and petition on removal should be vacated and set aside and declared void. (Transcript pp. 88-99). That defendants in error herein, of course, were obliged to repel this attack and to argue and oppose that application, and Judge Lacombe after hearing the parties and expressing from the bench his inability to set aside any proceeding taken under said judgment, directed that said defendants in error be enjoined until the further order of the District Court "made upon proper notice on the part of the plaintiffs to remand said case and the entry and the service of the said order thereupon". Plaintiff in error had argued before Judge Lacombe, that the Federal Court had sole and exclusive power to deal with the case even if the petition and record sent there, on its face showed that it was jurisdictionally defective. The argument of the defendants in error was that the City Court as well as the Federal Courts had concurrent jurisdiction to determine that question (Transcript p. 90). Judge Lacombe wrote an opinion before making his order to the effect that:

> "Jurisdiction is too doubtful to warrant this Court in retaining the cause. *Crane Co.* vs. *Guanics Centrale*, 132 F. R. 713. Plaintiff's proper course would have been to make a motion to remand. This he may now do.

When such motion is made and granted the cause may proceed there ;it is now here. Plaiatiff in the meanwhile may be enjoined (until remand is made) from proceeding further in the State Court.

October 30, 1915.

E. S. LACOMBE,
U. S. C. J."

After the order of Judge Lacombe based on said opinion was served, the plaintiff in error, on November 5th, 1915, served upon the defendants in error a notice of appeal to the Appellate Term of the Supreme Court (which is the Appellate Court of the said City Court), wherein plaintiff in error herein purported to appeal from said City Court order of Mr. Justice LaFetra continuing jurisdiction of the case, as well as from the said judgment entered in said City Court. Defendants in error herein, following the suggestion and the direction of Judge Lacombe in his said order, and in order that there be no question made as to the jurisdiction of the State Court, deponent immediately applied to the United States District Court for the purpose of securing a remand of the case to the City Court and on such application presented the facts above mentioned to the presiding Judge—Judge Hough. The question there came up directly as to whether the record including the petitions were jurisdictionally defective or not, and therefore the precise question as to whether the amount of the counterclaim could be considered in making up the $3000 requisite to attach jurisdiction to the Federal Court. Judge Hough, after considering the mat-

ter wrote an opinion (which is fully set forth on page 91 of the Transcript) and he thereupon remanded the case to the City Court by an order made November 16th 1915, a copy of which was served upon the attorney for defendant in that action (Transcript p. 92). This all occurred *after* the determination of the City Court on that question and *after* the City Court had entered judgment.

The appeal to the Appellate Court from the order of Mr. Justice LaFetra resulted in an affirmance, and a request for leave to further appeal to the higher Appellate Court was denied. But the plaintiff in error was not satisfied. Ignoring all of the orders and determinations of the various Courts, he again applied in the State Court to set aside said judgment and urging the same grounds as he had theretofore done. Said Court denied plaintiff in error's application, whereupon he again appealed but such appeal was subsequently dismissed and his application to appeal further to the higher Appellate Court of the State was likewise denied.

No effort whatever, at any time has been made by plaintiff in error to open his default in pleading or for leave to interpose any answer or counterclaim.

Thereafter, on application of plaintiff in error, Associate Justice Hughes, of this Court, issued a writ of error as cited in the transcript. (Transcript p. 135).

That the said appeal has been docketed and is now pending on the calendar of this Court and is number 407 on the calendar for the October Term 1916. Its file number is 25,174.

As indicated in our brief of argument the juris-

diction of said City Court to continue with the case after the filing of the petition of removal to determine the removability of the case and the sufficiency of the record on questions of law, is unquestioned. It is also submitted that the appeal taken by the plaintiff in error herein is wholly frivolous. It appearing therefore that the City Court could determine the question of law involved before it, the writ of error should never have been issued and this Court should not take unto it for determination the question as to the State Court's jurisdiction in the matter.

The case being one solely of jurisdiction, it is submitted that if this application is denied, that the Court advance this case on the calendar as provided by Rule 32: or transfer the appeal to the summary docket as provided by Rule 6, subd. 6

ABRAHAM ROSENSTEIN.

Sworn to before me this 11th day of November, 1916.

ROSS ADLER,
Notary Public, Bronx County.
Certificate filed in New York County.

FILED
DEC 15 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916.

BALTRUS S. YANKAUS,
Plaintiff-in-Error,

against

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN,
Defendants-in-Error.

No. 407.

VERIFIED STATEMENT OF PLAINTIFF-IN-ERROR, IN OPPOSITION TO MOTION TO DISMISS.

ROGER FOSTER,
Attorney for Plaintiff-in-Error,
55 Liberty Street,
New York City.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 2277-78-79 Broad.

Supreme Court of the United States

BALTRUS S. YANKAUS, Plaintiff-in-Error, against MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Defendants-in-Error.	No. 407.

VERIFIED STATEMENT OF PLAINTIFF-IN-ERROR, IN OPPOSITION TO MOTION TO DISMISS.

State of New York,
City of New York,
County of New York, } ss.:

Baltrus S. Yankaus, being duly sworn, deposes and says:

I am the plaintiff-in-error in the above entitled cause, and the defendant below.

That, upon information and belief, the defendants-in-error herein have filed a motion wherein they ask the Court,

1. To dismiss and quash the paper purporting to be a Writ of Error herein, for want of jurisdiction and upon other grounds.

2. To affirm the judgment of the State Court herein, upon the ground that it is manifest that said paper purporting to be a Writ of Error herein was taken for the purpose of delay only, and that the questions upon which it is claimed the jurisdiction depends are so frivolous as not to need further argument; and

3. That in the event of the denial of said motion to dismiss or to affirm, that the cause be advanced on the calendar, because the only matters in issue concern the jurisdiction of the Court below; or

4. That the cause be transferred to the summary docket.

Deponent further states, upon information and belief, that the motion should be overruled, and the relief denied, for the following reasons:

1. That this Court is given jurisdiction to hear and determine this appeal under Sec. 237 of the Jud. Code, R. S. Sec. 709, which is in words and figures as follows, to wit:

> "Sec. 709. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws, of the United States, and the

> decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. * * *"

This is a writ of error (Printed Record, page 134) to review an alleged default judgment of the City Court of the City of New York (P. R., page 7), which is one of the courts of record of the State of New York, and an order and decision of the same Court (P. R., page 134) which denied a motion to set aside said judgment, also an order of the Appellate Term of the Supreme Court of the State of New York (P. R., page 27), First Department, which affirmed the said order and judgment of the City Court, and an order of the New York Supreme Court, Appellate Division, First Department, denying leave to appeal (P. R., page 121).

The writ of error herein was thereafter duly allowed by Hon. Charles E. Hughes, then Associate Justice of the Supreme Court of the United States, pursuant to law, and the rules and practice of this Court.

The action herein is one at law, of which the United States District Court, for the Southern District of New York had original jurisdiction, pursuant to the statutes and laws of the United States, and of Sec. 24 of the Judicial Code, which reads in part as follows:

> "Sec. 24. The District Court shall have jurisdiction as follows: * * * Where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three thousand dollars":

and of Secs. 28 and 29 of the Judicial Code, hereinafter set forth; and was brought in the City Court of the City of New York, one of the State Courts, by defendants-in-error, plaintiffs below, against plaintiff-in-error, defendant below, to recover the sum of Eight hundred ($800) Dollars, and interest.

Upon information and belief, that at the time of the commencement of this action, the defendants-in-error were citizens and residents of the State of New York, and plaintiff-in-error was then and at all times since said time and date, a citizen and resident of the State of New Jersey.

That on or about, to wit, the 15th day of October, 1915, plaintiff-in-error caused due notice to be served upon the defendants-in-error, of his intention to file a petition and bond for removal of said action, on the 16th day of October, 1915, and that on said last mentioned date, which was prior to the time that plaintiff-in-error was required to answer, demur or otherwise plead in said action, as provided by the laws of the State of New York (New York Code of Civil Procedure) plaintiff-in-error duly filed in the office of the Clerk of the City Court of the City of New York, his petition (P. R., page 10), duly verified, for the removal of said cause from the said City Court, to the District Court of the United States, for the Southern District of New York, and that accompanying said petition, and at the time same was filed, a good and sufficient

bond (P. R., page 13) was presented, accepted and filed and duly approved by one of the Justices of said City Court. Said bond was in the sum of Five hundred ($500) Dollars. That all of said proceedings were in compliance with the statutes of the United States governing the removal of causes, which statutes are Secs. 28 and 29 of the Judicial Code, and are in words and figures as follows, to wit:

> "Sec. 28. Any suit of a civil nature, at law or in equity, * * * of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought in any State Court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. * * * And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district. Whenever any cause shall be removed from any State Court into any District Court of the United States and the District Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed."

"Sec. 29. Whenever any party entitled to remove any suit mentioned in the past preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such State Court at the time or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond with good and sufficient surety, for his or their entering in such District Court within thirty days from the date of filing said petition, a certified copy of the record in such suit and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, an-

swer or demur to the declaration or complaint in said cause and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

That in the petition and affidavit for removal, duly filed as aforesaid, there was alleged and set forth all the necessary jurisdictional facts, including diversity of citizenship of plaintiffs and of the defendant; that the case was a suit of a civil nature at common law, whereof the District Court of the United States, for the Southern District of New York, had original jurisdiction; that the defendant in the action had a counterclaim against the plaintiffs therein, exceeding the sum of Three thousand ($3,000) Dollars, exclusive of interest and costs, and that the matter and amount in dispute exceeds the sum or value of Three thousand ($3,000) Dollars, pursuant to the statutes of the United States in such case made and provided.

That the plaintiffs in the action did not appear or object to the removal thereof, notwithstanding the notice served on them on October 15, 1915, as above set forth.

That thereafter, on October 20, 1915, in accordance with the statutes above mentioned (Jud. Code, Sec. 29) and the practice prevailing in the United States Courts, a certified copy of the record on removal was duly filed in the office of the Clerk of the District Court of the United States, for the Southern District of New York; and that within thirty days from said last mentioned date, as provided by the statutes aforesaid, there was filed in said United States District Court Clerk's office the answer of the defendant (P. R., page 122), wherein, in addition to certain defenses, were alleged and

set up certain counterclaims against the plaintiff in the action, aggregating in amount upwards of One thousand ($1,000) Dollars.

That prior to the time of filing of such answer of the defendant in the United States District Court, the plaintiffs moved (P. R., page 8) in the City Court of the City of New York, for an order setting aside the bond and the removal of the cause to the United States District Court, and directing that the City Court retain jurisdiction of the action. This motion was based upon the ground that no answer had at that time been interposed, and that the amount or matter in controversy did not exceed Three thousand ($3,000) Dollars, except as shown by the petition and affidavit for removal of the action, and that in consequence the removal of the action to the United States District Court was claimed by the plaintiffs to be invalid.

This motion of the plaintiffs came on for hearing on October 20, 1915, before Hon. Edward B. La Fetra, one of the Justices of the City Court of the City of New York, who afterwards granted the motion, and made and signed an order (P. R., page 7) dated October 25, 1915, setting aside the removal of the action to the District Court of the United States, for the Southern District of New York, and determining that the action was not one entitled to be removed, and that the City Court of the City of New York continue to retain jurisdiction of the action as though no removal thereof had been made, as aforesaid. That the decision of the said Justice, filed on the motion made before him, was based upon the ground that the amount claimed in the action was to be considered and not the amount of any counterclaim therein. That im-

mediately thereafter, and on October 26, 1915, the plaintiffs in the action entered a judgment as upon an alleged default (P. R., page 7) in the City Court of the City of New York, against the defendant, for the amount claimed in the complaint, with interest and costs, and proceeded to and did attach the property of defendant in the action, which attachment is still in full force and effect (P. R., page 87).

This judgment was void for the reason that the City Court had no jurisdiction to render it; that the cause had been removed to the District Court for the Southern District of New York, and was then pending in that Court, and the same cause of action could not be pending in both the State and the Federal courts at the same time; and if it was pending in the Federal Court, then the State Court had no jurisdiction to render judgment against plaintiff-in-error by reason of any alleged default.

That notwithstanding these facts, the said City Court of the City of New York, assuming jurisdiction of this case, did render said judgment upon an alleged default, as aforesaid, and on which judgment an attachment order was issued and levied against the property of plaintiff-in-error; and that plaintiff-in-error was ordered by the said City Court to turn over his property in satisfaction of said judgment, but this plaintiff-in-error refused to do on the ground and for the reason the action had been removed from the City Court to the United States District Court, and upon the further ground that he was being deprived of his property without due process of law, and that the act of the City Court of the City of New York, in rendering the said judgment as upon an alleged default against plaintiff-in-error, and in causing the attachment to

be issued and levied against his property, and further ordering him to turn said property over, was in violation of Sec. 29 of the Judicial Code, which reads as follows, in part:

> "Sec. 29. * * * It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit. * * * And the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court";

and was further in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States of America, which is as follows, to wit:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. Deponent states positively that this appeal is not prosecuted for delay, and that if the relief asked for by defendants-in-error in their motion herein is granted, and this Court holds that the appeal was not prosecuted in good faith, and for delay only, and dismisses same, then plaintiff-in-error may be adjudged guilty of contempt by the City Court of the City of New York, on the ground

and for the reason that he refused to turn over his property on order of the Court, under said void judgment and attachment proceedings heretofore referred to, and would deprive deponent of his liberty.

Deponent further states that the appeals heretofore taken herein, and this appeal, the cost of printing briefs, records and other expenses incident thereto, have cost him as much money approximately, if not more, than it would have to have satisfied said alleged default judgment in the first instance, and if he was not acting in good faith in prosecuting this appeal, and believing that he had been grievously wronged on account of the proceedings taken herein, he would not have appealed said case.

That this deponent, the defendant in that action, duly appealed (P. R., page 2) to the New York Supreme Court, Appellate Term, First Department, from the judgment and order of the City Court, as aforesaid, pursuant to the New York Code of Civil Procedure, basing his said appeal upon the ground, and claiming that the judgment so entered against him was irregular and void because of the fact that the action, begun in the City Court of the City of New York, one of the State Courts, had actually been removed from that Court into the United States District Court, Southern District of New York, and was no longer pending in the City Court, and at the time the aforesaid judgment was rendered.

That in order, however, to further protect his rights and interests as defendant in that action, deponent moved in the United States District Court, for the Southern District of New York, for an order enjoining and staying all of the proceed-

ings in the City Court. This motion duly came on and was heard before Hon. E. Henry Lacombe, Circuit Judge, at that time sitting as District Judge, in the Southern District of New York, on October 29, 1915. The motion was strenuously and vigorously opposed by the plaintiffs, represented by Abraham Rosenstein, one of said plaintiffs in person, and after exhaustive argument was finally submitted to Judge Lacombe. Subsequently the said Judge, in a decision (P. R., page 38) made by him, and filed on said motion, which decision reads as follows:

> "Plaintiffs' proper course would have been to make a motion to remand; this he may now do. When such motion is made and granted, the cause may proceed there, it is now here. Plaintiffs are enjoined until remand is made from proceeding further in the State Court."

granted the motion of the defendant, and made and signed an order thereon, temporarily enjoining and staying all further proceedings on the part of the plaintiffs in the City Court of the City of New York.

That subsequent to the decision and order of Judge Lacombe, staying all of plaintiffs' proceedings in the City Court as aforesaid, the plaintiffs below moved in the United States District Court, Southern District of New York, to remand the action to the State Court, to wit: to the City Court of the City of New York. This motion came on before and was heard by Hon. Charles M. Hough, District Judge, on November 5, 1915, and after argument thereon, the motion was submitted to said Judge. Thereafter Judge Hough granted de-

fendant's motion to remand the action (P. R., page 79) upon the theory that the counterclaim in the action, if it could at all be considered, was not sufficient so that it could be properly said that the matter in controversy exceeded the sum of Three thousand ($3,000) Dollars, exclusive of interest and costs. That an order was thereupon made, dated November 15, 1915, remanding the action to the City Court of the City of New York, from whence it had theretofore been removed to the United States District Court, Southern District of New York, as above set forth.

After the action had thus been remanded to the City Court of the City of New York, by the order of Judge Hough, this deponent then moved (P. R., page 81) in said City Court, for an order vacating and setting aside the judgment entered in that Court on October 26, 1915, and the order of Judge La Fetra of the City Court, dated October 25, 1915, upon which said judgment had been obtained.

In this motion it was claimed that the City Court was without jurisdiction to render said alleged default judgment, for the reason that said cause had previously been removed to and was then pending in the United States District Court, for the Southern District of New York, and that the said City Court, in assuming jurisdiction, and in rendering said judgment, violated Sec. 29 of the Judicial Code, which is, in part, as follows:

> "Sec. 29. * * * It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit. * * * And the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court":

and that the said defendants-in-error, by their actions, had admitted that said action was pending in said United States District Court, by appearing and opposing the application presented by plaintiff-in-error, for an injunction restraining the City Court of the City of New York from enforcing said judgment, and in further appearing in said Federal Court in said action, and filing a motion therein to remand, and asking that the Court remand said action to the said City Court; and plaintiff-in-error further claimed that if said alleged default judgment was not set aside, but was permitted to stand and be enforced, he would be deprived of his property without due process of law, in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States.

That before this last mentioned motion was made, an appeal taken by the defendant from the judgment entered against him in the City Court, as aforesaid, and from the order of Judge La Fetra, setting aside the removal of the action to the United States District Court and declaring that the case was at all times in said City Court, had been affirmed by the Appellate Term of the New York Supreme Court, First Department. That the motion to vacate the judgment and under aforesaid, and which came on for hearing before Mr. Justice Schmuck, was denied by said Justice upon the ground that the matter had already been virtually decided by Judge La Fetra, his Associate Justice, on plaintiffs' original motion, made before said Justice La Fetra of the City Court as aforesaid. The defendant in the action thereupon appealed from the order entered upon the decision of Mr. Justice Schmuck, upon the motion made before him, to the Appellate Term, New York Supreme Court,

First Department, pursuant to the provisions of the New York Code of Civil Procedure, to wit: Sec. 1341, which reads, in part, as follows:

> "An appeal taken as prescribed in this title must be heard by the Appellate Division of the Supreme Court, except that appeals from the judgment of any municipal court in either of the Borough of Manhattan or the Bronx in the City of New York, or from a judgment or order of the City Court in the City of New York, may be heard by the Appellate Division of the Supreme Court, or by such justice or justices of the Supreme Court as may be designated for that purpose by the justices of the Appellate Division sitting in the first judicial department. In case an appeal is heard by a justice or justices of the Supreme Court as hereinbefore provided, the justice or justices by whom such appeal was determined, or a justice of the Appellate Division in the first judicial department may allow an appeal to be taken to such Appellate Division from such determination. * * *"

That upon motion (P. R., page 95) of the plaintiffs in the action, however, and before the appeal from the order of Justice Schmuck had been regularly reached for argument, the said Appellate Term dismissed the said appeal (P. R., page 99) upon the ground that the questions involved therein were academic, by reason of the prior affirmance by said Appellate Term of Judge La Fetra's order above mentioned. That thereupon this deponent, defendant below, pursuant to the rules and practice of the New York Supreme Court, applied for leave

to appeal (P. R., page 54) to the New York Supreme Court, Appellate Division, First Department, from the order of October 25, 1915, and from the judgment entered thereon on October 26, 1915, and also from the dismissal of the appeal from the order of Mr. Justice Schmuck, as aforesaid. Both these motions of the defendant having been denied by said Appellate Term (P. R., page 54), deponent moved before a Justice of the Appellate Division of the Supreme Court, First Department (P. R., page 76), pursuant to Sec. 1344 of the New York Code of Civil Procedure, above quoted, for an order permitting him to take said appeals. These applications were severally denied by that latter court (P. R., page 77). That deponent, as defendant in the action in the State Court, had thus regularly proceeded therein as far as it was possible or permitted him to go under the statutes of the State of New York, to obtain the redress which he sought, and to which, under the facts and circumstances shown by him, he deemed himself legally entitled.

That in both of the said applications made by deponent, the defendant below, said defendant set forth the facts which showed, as claimed by him, that he had been denied the rights, immunities and privileges asserted by and secured to him under the Constitution and statutes of the United States, Secs. 24, 28 and 29 of the Judicial Code, and that his property was taken away from him without due process of law, and in violation of the 14th Amendment, Sec. 1, of the Constitution of the United States.

That accordingly, this deponent applied upon petition (P. R., page 137), duly filed by him on February 10, 1916, to the Judges of this Honorable Court, for a Writ of Error to bring up for review

the proceedings mentioned in said petition. That said writ of error was duly allowed by the Hon. Charles E. Hughes (P. R., page 134), then Associate Justice of the Supreme Court of the United States, and a citation in the action was duly issued out of this Court, and was duly served, together with the writ of error and a supersedeas bond, upon each of the plaintiffs, defendants-in-error in the action aforesaid.

That the said appeal is now standing undetermined on the calendar of this Court, and briefs have been filed on behalf of deponent, plaintiff-in-error herein.

That this motion to dismiss was not served on plaintiff-in-error until after the record had been printed and the briefs printed and filed in this Court, and plaintiff respectfully invites the Court's attention to the brief filed in his behalf herein, in which authorities are cited in support of the propositions as contended for in this affidavit.

Deponent asks the Court to do this in view of the fact that defendants-in-error filed no brief in support of their motion to dismiss, other than the separate brief filed by them in answer to the brief filed on behalf of deponent in this action.

Deponent submits that in view of the matters and things hereinbefore set forth, that this Court has jurisdiction to hear and determine this appeal, and that the writ of error duly issued out of this Court should not be dismissed or quashed for want of jurisdiction of this Court, or on any other ground, and that said action should not be affirmed on said motion, for the reason as alleged, that it is manifest that said writ of error herein was taken for delay only, and that the questions upon which it is claimed that jurisdiction depends are so frivolous

as to not need further argument, and that if said motion is denied that this cause be advanced on the calendar, because the only matter in issue concerns the jurisdiction of the Court below, or that this cause be transferred to the summary docket.

Deponent states in this connection that he has no objection to said cause being advanced on the docket, but that there is something more involved in this appeal than the jurisdiction of the lower Court. That it is absolutely necessary to construe Secs. 28 and 29 of the Judicial Code, as hereinbefore set out, and which sections relate to removal of causes and the jurisdiction of the District Courts of the United States of America thereon, but that this appeal also involves Sec. 1 of the 14th Amendment to the Constitution of the United States, and that said constitutional provision has nothing whatever to do with the question of jurisdiction, but that plaintiff claims the protection of said amendment, and claims that it was violated in this proceeding, and that he was deprived of his property without due process of law.

Deponent therefore submits that said cause herein appealed from should not be dismissed or affirmed, but, on the contrary, should be reversed.

BALTRUS ℒ YANKAUS.

Sworn to before me this
14 day of December, 1916.

E. G. DELANEY,
Notary Public,
Kings Co. (160).
Cert. filed in New York Co. (203).

22359-

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1916.

No. 407.

BALTRUS S. YANKAUS,
Plaintiff in error,

against

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN,
Defendants in Error,

DEFENDANTS BRIEF FOR MOTION.

JACOB W. HARTMAN,
Attorney for Defendant-in-error

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Supreme Court of the United States

BALTRUS S. YANKAUS,
Plaintiff in error,

against

MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN,
Defendants in Error.

BRIEF IN FAVOR OF MOTION.

The defendants in error move to dismiss the writ of error issued herein to the City Court of the City of New York, because of want of jurisdiction and also to affirm the judgment of that Court on the ground that the appeal is frivolous and is taken for the purpose of delay only, and in the alternative, in the event of a denial of the motion, that the Court advance this cause or place it upon the summary docket.

This motion is based upon a verified statement of facts as well as upon the printed Transcript of Record now on file with the Clerk of this Court No. 407, October 1916 term.

As disclosed by the verified statement and the transcript of record, the matter has been brought to this Court by a writ of error issued to the New York State Appellate Courts which had affirmed an order made in the City Court of the City of New York, setting aside a pretended

removal of this suit to the Federal Court and adjudging that the record on removal was jurisdictionally void and that the State Court continue with the case.

The question involved is one of juridiction and is narrowed down to the proposition that if the Record on removal did not show facts sufficient to work a removal, then the State Courts action was wholly proper and the State Court on the question of law thus arising had *concurrent* jurisdiction with the Federal Court to determine the sufficiency of the record. If on the other hand, the Record on removal presents facts, sufficient to effect a removal, then the case automaically transfers itself to the Federal Court.

The contention of the plaintiff in error seems however, to be that the State Court could under no circumstances determine upon the sufficiency of the Record on removal; a proposition of law which the defendants in error dispute.

POINT I.

The Federal and State Courts have concurrent jurisdiction to determine as to whether a record on removal presents sufficient facts to entitle the cause to be removed; and if as a question of law it appears from the face of the papers that they are insufficient to effect a removal, then the state court continues jurisdiction never having been ousted from it.

In sustaining this argument, it might be well to ascertain the source of an applicant's right

to remove a cause from the State to the Federal Courts. By the Federal Judiciary Act, "any suit of civil nature of which the District Courts of the United States *are given original jurisdiction* by this title which may now be pending or which may hereafter be brought in any State Court may be removed by the defendant or defendants therein to the District Court of the United States."

Judicial Code Section 28; *U. S. Comp. Stat. Section* 1010.

"Whenever any party *entitled* to remove any suit mentioned in the last preceding section may desire to remove such suit from a State Court, to the District Court of the United States, he may make and file a petition duly verified in such suit and such State Court at the time or at any time before the defendant is required by the Laws of the City or the Rules of the State Court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit into the District Court it shall then be the duty of the State Court to accept such petition and bond and receive no further any such suit."

Judicial Code, Section 29;
U. S. Comp. Stat. Section 1011.

"The District Courts shall have *original jurisdiction* as follows: 1st: of all suits of a civil nature at common law or in equity * * * where the *matter in controversy* exceeds, exclusive of interest and costs, the

sum or value of $3,000 and * * * is between citizens of different states."

Judicial Code, Section 24. *Act March 3rd* 1911.

The above quoted statutory provisions govern the questions involved. Under the very statement of the statute, the State can proceed no further in a suit, provided the applicant is "entitled" to remove it. He is entitled to remove the suit only in a case where the District Court has orginal jurisdiction, that is, where the "matter in controversy" is the sum or value of $3,000 or more. The clear intent of the Statute is that the filing of the necessary petition and bond works a removal only where a party is "entitled" to the removal under the Statute. If the party is not so "entitled," then of course the case proceeds on in the State Court as though no such petition or bond had been filed.

To determine that question, an examination of the Record on appeal is necessary. It is established by a long line of uninterrupted authority that the State Court still has power, even after a petition and bond, has been filed to determine the sufficiency of the facts herein contained.

The leading case on the subject, the doctrine of which has never been in the slightest degree questioned, limited or modified, is the case of *Madisonville Traction Co.* v. *Saint Bernard Mining Company*. 196 U. S., 239 where the entire practice on removal is disclosed, the Court pointing out the procedure to be followed on such applications. The head-note written by the Court (and which is a repetition of the opinion itself) presents the following propositions on removal practice:

"In regard to the removal of cases the following principles have been settled: If the case be a removable one, that is, if the suit, in its nature, be one of which the Circuit Court could rightfully take jurisdiction, then upon the filing of a petition for removal in due time, with a sufficient bond, the case is, in law, removed and the State Court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. * * *

"If upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the State Court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made.

"Under the judiciary act of 1887, 1888, a suit cannot be removed from a State Court unless it could *originally* have been *brought* in the Circuit Court of the United States."

This case merely iterated in assembled form what had been the uninterrupted and uniform practice respecting the removal of cases.

Springer v. *Howes*, 69 Fed. 849;
Stone v. *South Carolina*, 117 U. S. 430;
Burlington v. *Dunn*, 122 U. S. 513;
Harradi v. *Vardrey*, 172 U. S. 148, 160;
Hill v. *Woodland Amusement Co.*, 158, Fed. 530;
Carson v. *Height*, 118 U. S. 276;
Powers v. *Chesepeake R. Co.*, 169 U. S. 92;
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Achore v. *Ry. Co.*, 131 U. S. 240;
Todd v. *Cleveland &c. Ry. Co.*, 65 Fed. 145;

Wehore v. *Ohio & M. Ry. Co.*, 131 U. S. 240.

All the District Court cases since the Madisonville case have followed the rule and upheld the State Courts continuance of jurisdiction unless the record on appeal shows the removability of the case.

City of Montgomery v. *Postal Telegraph* 218 Fed. (D. C. Ala.) 471;
Miller v. *Soule*, 221 Fed. 493 (D. C. Pa.)
Goin v. *So. Pacific Railroad*, 198 Fed. 132, (D. C. Cal.);
Mo. K. & T. Ry. v. *Chappell*, 206 Fed. 688, (D. C. Okl.);
Springer v. *Howes*, 69 Fed. 849.

In the cases plaintiff in error cited below, and which he may again present to this Court, there was no question as to the sufficiency of the record on removal, and the Court's views expressed in such cases either assuming that the petitioners were "entitled" to remove the cases, or the sufficiency of the petitions was not questioned. Such for instance are cases he cites, like:

Kern v. *Huidekoper*, 103 U. S. 845;
Buxton v. *Pa. Lumber Co.*, 221 Fed. 775;
Donovan v. *Wells Fargo & Co.*, 169 Fed. 362;
Southern Railroad v. *Koontz*, 104 U. S. 14.

These and other cases prohibit the state court in the words of the statute, not to proceed further with the case, but only where the removability is unquestioned.

"Before a party can avail himself of it (the right of removal) *he must show upon the record* that his is a case which comes within the provisions of the statute. His petition for removal when filed becomes a part of the record in the case which should state facts, which taken in connection with such as already appear, entitled him to the transfer. *If he fails in this, he has not in law shown* to the Court that it could not 'proceed further with the case'."

Insurance Co. v. *Pechener*, 95 U. S. 182;

As repeated again by this Court

"when a petition for removal of a cause to the Circuit Court of the United States is filed in a cause pending in a State Court, the State Courts are at liberty to consider the actual facts, as well as the law arising on the face of the Record after the presentation of the petition for removal. Of course the issues of fact made upon petition for removal can only be tried in the District Court, but *the State Court may determine for itself whether on the face of the record a removal must be had.*" (Citing *Railroad Co.* v. *Ramsey*, 22, Wall. U. S. 322).

Burlington v. *Dunn*, 122 U. S. 513.

So, as again stated in one of the above cited cases a mere filing of the petition for a removal of a suit *which is not removable* does not work a transfer. To accomplish this, the suit must be one that may be removed, and the petition must show a right of the petitioner to demand a removal.

Stone v. *South Carolina*, 117 U. S. 432.

The question that the State Court determines is one purely of law. That is, admitting the facts recited in the petition on removal to be true, does it appear on the face of the Record that the petitioner is entitled to removal?

Donovan v. *Wells Fargo Co.*, 169 Fed. 633.

Were there any doubt on the question, the matter is wholly put at rest by a decision of this Court handed down only this year, which had before it the following facts for determination:

A petition set forth that plaitiff had asked only for judgment in the sum of $1,900 and the answer set up that defendant a Raidroad Company, was a citizen of a different State and alleged that the amount in controversy exceeded the jurisdictional sum, and after various applications, it appeared that the State Court continuing jursidiction of the case, had rendered a judgment in favor of plaintiff. An appeal was taken to the highest Court of the State, where the judgment was affirmed. The case was then brought to this Court on the ground that a Federal question was presented. Mr. Justice Day, of this Court, after presuming these facts observes as follows:

> "It was of course essential to the removal of the case that the amount in controversy should have been sufficient to give the Federal Court jurisdiction; that is to say, $3,000, exclusive of interest and costs. The State Court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action, notwithstanding the statement that the state had suffered damage in the sum of $10,000.

"It is contended that, nevertheless, the proceedings in this case show that the case was removed to the United States Circuit Court, and inasmuch as the State Court lost jurisdiction, its subsequent proceedings are null and void.

"In *Madisonville Traction Company* v. *Mining Company*, 196 U. S. 239, this court said, citing many previous cases, that certain principles relating to the removal of causes had been settled by the former adjudications of the Court. One is that if the suit be one in which the Circuit Court could rightfully take jurisdiction, then upon the filing of the petition for removal in due time, with sufficient bond, the case is in law removed, and all subsequent proceedings therein are void. Furthermore, that *if upon the face of the record, including the petition for removal the suit does not appear to be removable, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made.* See also the previous cases in this Court cited in the Traction Company Case, at pages 244 and 245.

"Applying these principles, it is apparent that the case now under consideration was not upon the face of the record a removable one. The prayer for recovery was for $1,990, consequently the amount required to give jurisdiction to the Federal Court was not involved. *The filing of the petition and bond did not therefore effect a removal of the case*".

Iowa Central Ry. Co. v. *Bacon*, 236 U. S. 305, at p. 309.

Our State Courts when retaining jurisdiction after filing a removal petition have merely follow-

ed out the rules and practice of the Federal Courts.

Tierney v. *Helvetia Swiss Fire Ins. Co.*, 126 App. Div. (N. Y.) 446;
Orr v. *Baltimore Ohio R. R. Co.*, 83 Misc. 221 (N. Y.);
Republican Fire Insurance Co., v. *Krogh*, 23 Hun. 644 (N. Y.).

Where the Federal and State Courts have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other.

Harvadi v. *Vardrey*, 172 U. S. 148, 160.

The State Court having in this case been the earlier Court and having jurisdiction with the Federal Courts on the question, it had a right to determine that the Record on removal was jurisdictionally and wholly defective, even though plaintiff in error forced the issue into the Federal Courts, by securing an injunction resulting in the subsequent motion for remand, the Federal Court likewise holding the Record as jurisdictionally defective. (Transcript record, printed pp. 52-90).

POINT II.

The record on removal, showing on its face that it was wholly and irretrievably fatally defective, the State Court's right to continue with the case was unquestioned.

It is necessary here to subdivide the argument in order to cover the different angles which spread out in the discussion of this question.

A.

In considering the sufficiency of a removal the entire record on removal is consulted, and in this cause the record includes the summons, complaint, bond and petition on removal.

This rule is an elementary proposition of practice.

Insurance Co. v. *Pechner*, 95 U. S. 182;
Burlington R. R. Co. v. *Dunn*, 122 U. S. 513;
Louisville R. R. Co. v. *Wangelin*, 132 U. S. 601;
Connell v. *Smiley*, 156 U. S. 337;
Beadleston v. *Harpending*, 32 Fed. 644;
Alabama Ry. v. *Thompson*, 200 U. S. 206 at p. 216;
Helena P. T. Co. v. *Spratt*, 140 Fed. 310 (C. C. Mont. 1906)
(Citing a number of cases of this Court)

B.

In determining the removability of a cause, the only pleading in the record which can be considered is the bill of complaint.

This proposition is clearly brought out in a leading text book on the topic.

"The better reason supports the statement that the sum or value put in issue by plaintiff's complaint determines the question of jurisdiction upon removal, and that a counter-claim by defendant cannot be added to make

the jurisdictional amount. * * * That to be removable, a suit must be one which a circuit court of the United States could take *original* jurisdiction under Sec. 1 of the *present* Judiciary Act. It is clear that the sum or value put in *issue by plaintiff's complaint* is under that section the jurisdictional criterion in a suit begun in a United States Circuit Court."

Moon on Removal (1901) Sec. 98.

This Court had already enunciated that view of the Amended Statutes.

"The general policy of the Act of March 1887 * * * *as is apparent on its face* and has been repeatedly recognized by this Court, was to *contract* the jurisdiction of the Circuit Courts. Those cases and those only were made removable under Section 2, in respect of which original jurisdiction was given to the Circuit Courts by Section 1. Hence it has been settled that a case cannot be removed from a State Court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws or treaties of the United States, unless that appears by *plaintiff's statement of his own claim;* and if it does not so appear, the want of it cannot be supplied by any statement of the *petition for removal or in the subsequent pleadings.* And moreover that jurisdiction is not inferred by the allegation that defendant *intends* to assert a defense based on the Constitution, or a law or treaty of the United States, or under statutes of the United States, or of a State in conflict with the Constitution." (Citing cases).

Arkansas v. *Kansas Coal Co.*, 183 U. S. 185, 188.

"The *test of the right* of removal *is that the case must be one* which the Circuit Courts might have exercised original jurisdiction under Sec. 1 of the Act of March 3, 1887, as corrected by Act of Aug. 13 1888. The cases hold that to give the Circuit Court *original* jurisdiction the Federal question *must appear necessarily in the statement* of plaintiff's cause of action, and not as mere allegations of the defense which the defendants do set up or which they rely upon. *3rd St. Ry. Co.* v. *Lewis*, 173 U. S. 457."

Boston & Mining Co. v. *Montana Ore Co.* 188 U. S. 632, at p. 640.

The District Courts have reasserted the rule.

Eisele v. *Oddie*, 128 Fed. 841.
Hayne v. *Wolley*, 180 Fed. 573.
Baily v. *Wooley*, 183 Fed. 1021.

The radical change made by the Removal Act of 1897-8 influenced in a great measure in determining the question of remand when the Record at bar came up for determination in the District Court. (Transcript of record, print p. 52).

So in a Circuit Court of Appeals case the Court says:

"Under the latter (1875) act, it was deemed sufficient for the purpose of removal if the record disclosed the existence of the federal question. The Act of 1888, however, affects a radical change in that respect. The courts *no longer* search the record to ascertain whether the case be removable but confine themselves to examination of the bill, declara-

tion, petition, or complaint of the plaintiff. If the initial pleading of the plaintiff fails to disclose a cause of action arising under a law of the United States, the defendant will not be permitted to supply the omission by allegation in his petition for removal showing that it is one so arising."

W. G. Coyle Co. v. *Stern*, 193 Fed. 582 (8 Cir.—1912)

And when we take the converse situation of the proposition we find that "the fact that the plaintiff's pleading shows a sufficient defense to part of his claim to reduce it below the jurisdictional amount does not divest the Court of jurisdiction."

Foster's Fed. Pr. (5th Ed.) Sec. 23,

citing:

Re Metropolitan St. Ry. Receivership, 208 U. S. 90.

Fuller v. *Metropolitan Life Ins. Co.*, 37 Fed. 163.

Stillwell v. *Williamson*, 80 Fed. 68.

If the rule were otherwise, the authorities would have declared that by pleading a counterclaim which exceeds the jurisdictional amount, the original plaintiff would be in the same position as a defendant, and he would remove the case to the Federal Court. But the decisions appear to hold the contrary.

Foster's Fed. Pr. (5th Ed) Sec. 542,

citing:

West v. *Aurora City*, 6 Wall. 139 (and other cases.)

C.

Even were the defendant's plea, counterclaim or set-off allowed to be considered in determining the amount in controversy, if in fact there was no such plea, set-off or counterclaim made a part of the record, it prevents the plaintiff in error from using the intended counterclaim as a means of transfer.

It is conceded and in fact it cannot be denied that the alleged counterclaim at the time of the removal on October 16th, 1915, was no part of the record on removal. In fact it was not interposed till long after defendants in error had docketed their judgment in the State Court (Notice papers). In fact, the answer itself, which we find a part of the Transcript of Record (print. p. 122), shows that it was verified on November 8, 1916 (print. p. 132). Plaintiff in error very significantly omits to state the date of its service. Therefore, as it was not a part of the record, it can have no influence on the question even though the petition alleges the existence of an alleged counterclaim of over $3,000.

Under the authorities "the question of removability depends upon the state of the pleadings and the record at the time of the application for removal."

Alabama S. Ry. Co. v. *Thompson*, 200 U. S. 206, at p. 216.

Even though the petition shows an intention to plead a counterclaim, that would not suffice, for the pleadings themselves must disclose the controversy, and an averment in the petition would not be competent in ascertaining the amount in controversy.

Arkansas v. *Kansas Coal Co.*, 183 U. S. 185.

Sturgeon River B. Co. v. *Sawyer*, 89 Fed. 113.

W. Coyle Co. v. *Stern* 192 Fed. 582 (C. C. A.)

Moon on Removal §98, note 4.

The mere fact that the petition on removal herein asserted that defendant had a counterclaim exceeding $3,000 in amount and that the amount in controversy exceeded that sum *by way* of a counterclaim, is totally insufficient to have worked a removal, for it is held that in determining the removability of a case the facts showing the same must appear by *plaintiff's own statement* of his claim "and if it does not so appear, the want of it *cannot be supplied* by any statement of the petition for removal or in subsequent pleadings. And moreover that jurisdiction is not inferred by the allegation that defendant *intends* to assert a defence based on the constitution." etc.

Arkansas v. *Kansas Coal Co.*, 183 U. S. 185.

The entire record on removal being considered in determining the question, there having been a failure or omission to submit a defending plea or counterclaim, our argument becomes all the more unanswerable.

As was recently stated:

> "Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of

> the subsequent proceedings. * * * It is not enough that grounds of jurisdiction other than diverse citenship may be *inferred argumentatively from the statements in the bill*, for jurisdiction cannot rest on any ground that is *not affirmatively and distinctly set forth*."

Shulthis v. *McDougal*, 225 U. S. 561, 32 Sup. Ct. 704.

The conclusion and assumption of the pleader of what his counterclaim is going to be, as stated in his petition on removal and the affidavit of his attorney, certainly come within the condemnation of the foregoing authorities.

Commenting on the frailty of the very petition in question, Judge Hough says:

> "The petition says in substance that the defendant has counterclaim, without stating what it is. Whatever may be the preferred rule, when in a proper and formal manner the amount in controversy between the parties is made to appear and shown to exceed $3,000 exclusive of interest and costs;—I feel justified in holding, and do hold, that it is impossible to show that such controversial amount exists in any such manner as this defendant has attempted." (Transcript of Record, Print. p. 53)

It would be absurd to argue, if such an argument is offered, that the answer, *now* a part of the record in this Court (Transcript of Record, print. p. 122), obviates the deficiencies pointed out by Judge Hough. For the only matters presented to determine removability is the state of the record at the time of the filing of the peti-

tion, viz.: October 16, 1915, and not after said November 8th, 1915 (Transcript of Record, print. p. 132), and at period subsequent to the time defendants in error had entered their judgment, on October 26, 1915.

D.

A counterclaim or set-off, even if interposed in an action cannot be considered in determining the amount in controversy.

It it essential in determining this point to note the extreme difference between the wording of the present Statute (amended in 1887-8) and the Statute as it existed before then. The amendment it appears had become necessary because an abuse had grown up in the removal of cases by the injection of puffed, fraudulent or pretended counterclaims.

> *Waco Hardware Co.* v. *Michigan S. S. Co.*, 91 Fed. Rep. 289.

And in order to "contract the jurisdiction of the Federal Courts," the amendment was passed.

> *Arkansas* v. *Kansas C. Co.*, 183 U. S. 185;
> *Missouri Pacific R. R. Co.* v. *Fitzgerald*, 160 Fed. 556, at p. 581;
> *W. G. Coyle Co.* v. *Stern*, 193 Fed. 382 (C.C.A.);
> Glove Machine Co. v. Cooke-Jellico Co. 222 Fed. R.

The three most notable differences in the Statute are that the removing party can only be the defendant in the State Court; further, the time

within which the application must be made must be at a period *prior to* the time that the defendant is required to plead in the State Court action; and thirdly, the case must be one of which the District Courts of the United States have *original* jurisdiction. This may explain the apparent finding by several decisions rendered prior to the 1887 amendment, whose effect is nullified by that amendment.

We have been able to find no case *subsequent* to the 1887-8 amendment which has permitted the set-off or counterclaim to be taken into consideration in determining the removability of a cause but if there chances to be one, it will be found that it is based on some decision or authority rendered under the old Act which, as above shown has no further force because of the 1887-8 amendment.

We have been able to find only one case in the Federal Courts where it was squarely held under circumstances like the one involved on this appeal that the counterclaim was permitted to be taken into consideration, and that is the case of

Clarkson v. *Manson*, 4 Fed. Rep. 257.

Criticising that case, it was later held and even before the amendment of the Removal Acts that if the Clarkson case was good law "the door for removals is wide open whenever a defendant, for purposes of delay or otherwise, chooses to interpose a counterclaim for more than the prescribed sum; thus drawing into United States Courts the trial through the device of a counterclaim of any cause in which the amount claimed by plaintiff although less than $500, is to be determined."

Falls Wire Mfg. Co. v. *Broderick*, 6 Fed. Rep. 654 (C. C. A.).

But the Clarkson case, in our opinion, was based on the false premise that the removability of a case did not depend on the condition of the record at the commencement of the action, as was there urged, but at the time of the filing of the petition, it appearing that at that time an answer had been interposed containing a counterclaim for an amount exceeding the jurisdictional sum. The premise was wrong because at that time the Courts had uniformly held that removability depended upon the diversity of citizenship at the time of the commencement of the action and not subsequently, as is shown in

> *LaMontagne* v. *Harvey Lumber Co.*, 44 Fed. 645.

Under the old Statute, as well as the amended one, the clear weight of authority has held that a counterclaim cannot be taken into consideration in determining the removability of a State suit.

> *McKown* v. *Kansas Coal Co.*, 105 Fed. 657;
> *LaMontagne* v. *Harvey Lumber Co.*, 44 Fed. 645;
> *Falls Wire Co.* v. *Broderick*, 6 Fed. 654.
> *Bennett* v. *Devine*, 45 Fed. 705.
> *Sturgeon River B. Co.* v. *Sawyer*, 88 Fed. 113;
> *Foster's Fed. Pr.* (5th Ed. 1913).
> *Moon on Removal* (1901) Sec. 98.

There are cases which have permitted the counterclaim to be taken into consideration, but different influences and conditions were present in such cases which are absent in this case. Such are cases where a plaintiff was permitted

to seek removal to the Federal Court because the defendant in the State Court had interposed a counterclaim in an amount sufficient to bring the case into the Federal Court.

Carson Lumber Co. v. *Holtzclaw*, 39 Fed. 578;
Wolcott v. *Watson*, 45 Fed. 529;
Price & Hart v. *Ellis Co.*, 129 Fed. 482.

Though as to that proposition very respectable authority has denied plaintiff the right to remove.

LaMontagne v. *Harvey Lumber Co.*, 44 Fed. Rep. 645;
Waco Hardware Co. v. *Michigan S. Co.*, 91 Fed. Rep. 289;
Illinois Co. v. *Waller*, 164 Fed. 358;
Glover Machine Works v. *Cooke-Jellico Coal Co.*, 222 Fed. Rep. 531.

In examining the cases which permit the consideration of the counterclaim it will be found that di-versity of opinion is caused merely by the fact that removal was permitted before the 1887 amendment in such States where the defendant was *bound* to interpose his counterclaim, otherwise he would be barred from ever after claiming under it.

Lee v. *Continental Ins. Co.*, 74 Fed. 424,
McKeown v. *Kansas Coal Co.*, 105 Fed. 657.

The Plaintiff in error may cite to this Court, as he has cited to the State courts, a line of decisions of which

Harten v. *Loffler*, 212 U. S. 397,

Export & Import Co. v. *Port Banga Lumber Co.*, 237 U. S. 388.
Martinez v. *Int. Bk. Corp* 220 U. S. 214

are illustrations. And also a line of decisions following the case of *Hilton* v. *Dickinson* 108 U. S. 165, where in determining the jurisdictional sum for the purpose of appeal of cases from the Circuit Court of Appeals or of the territories, this Court has been called upon to define the term "matter in controversy."

Although in those cases this, Court has held that the controversy is shown by the whole record, which may include a counterclaim this merely refers to this Courts jurisdiction in determining a *review* of Federal Courts decisions and in respect to such matters the Courts have held that the *whole record* must be examined.

Bradstreet v. *Higgins*, 112 U. S. 227.

Our answer to this argument is best illustrated in considering, for instance the case of *Export & Import Lumber Co.* v. *Port Banga Lumber Co.*, (237 U. S. 388), above cited. In that case an appeal was taken from the Courts of the Philippine Islands to this Court, by virtue of Acts of Congress under which this Court is given "jurisdiction to review, reverse or affirm * * * the final judgments or decrees of the Supreme Court of Philippine Islands in all actions now pending therein or hereafter determined thereby, in which the Constitution or any statute, treaty, title, right or privilege of the United States is involved or in cases in which the value in controversy exceeds $25,000.* * *"

Act of 1902, Sec. 10, Chap. 1369, (32 U. S. Statutes, 691, 695).

This Court very properly held that the value in controversy will be ascertained only from "a consideration of the *whole* record. * * * What is *actually* in dispute herein is the criterion."

This Court therefore determined, as is shown at page 390, that the *issues* which were involved in the *trial* as developed by the evidence, as distinguished from the pleadings, which resulted in the judgment appealed from, was the criterion with which this Court would concern itself. The Court stated the contents of the pleadings merely to show the theory and claim of the appellant; but not with a view of determining the jurisdiction from the pleadings. Were that the Court's intention, it would have, in the opinion, merely referred to the pleadings and suggested that they were the guide which the Court would follow in making its determination. As this Court says, *the whole record* will be searched to ascertain the amount in controversy.

The cases cited by Judge McReynolds hold precisely the same as does the Export case.

The great difference between the cases respecting Appellate jurisdiction and the case at bar is this: On review on appeal the *whole* record must be searched to determine what the amount in controversy really was—not what a party stated it in his pleadings to be, but what the evidence has developed, whereas in the case at bar the very fact that the law with respect to remand makes it peremptory that such motion be made *before answer* or counterclaim is put in, clearly shows that the only matter that the Court considers in determining the matter in controversy is the pleadings, as far as they have gone, which in that case can only be the complaint. The Court cannot wait until the trial and determine from the evidence what the matter in controver-

sy really was, nor can it even search the answer, for no answer can be interposed.

This clearly indicates that the intention of Congress was to permit no transfer of a case to this Court unless the jurisdiction of the Court appeared from the bill of complaint.

On the other hand, assuming that under the Act of Congress with relation to appeals above referred to, the complaint demanded $100,000 and a counterclaim demanded another $100,000, yet if the evidence showed that the matter in controversy was really not that much, but together the counterclaim and demand amounted to less than $25,000, the jurisdiction to review would not attach.

It is therefore obvious that the cases respecting Appellate jurisdiction are not authority opposing our contention.

The same comment we have made in reply to the Export case (237 U. S. 388), applies equallly to a number of other cases that may be cited by the plaintiff in error herein where there came up for determination the question as to what would be considered as the matter in controversy in determining the jurisdiction of the United States Supreme Court. Such are the cases of.

Ryan v. *Bradstreet*, 1 Wall. 66;
Hilton v. *Duknin*, 101 U. S. 165;
Harten v. *Loeffler*, 212 U. S. 397;
Bradstreet v. *Higgins*, 112 U. S. 227;
Block v. *Darling*, 140 U. S. 234;
Burkstaff v. *Russell*, 151 U. S. 626.

As a text book, already quoted from, says:

"The cases which hold that a counterclaim may be considered in computing the sum in

dispute to determine *appellate jurisdiction* are not in point here. *Bradstreet Co.* v. *Higgins,* 112 U. S. 227; *Ryan* v. *Bindley,* 1 Wall. 66. Appellate jurisdiction is determined by the sum or value in dispute at the *end of a suit;* the original jurisdiction of a U. S. Circuit Court, and hence jurisdiction by removal, by the sum or value in dispute at the *beginning* of the suit (and which continues to be in dispute when a removal is sought), by the matter put in issue by the bill, complaint, or petition, or, in some jurisdictions, by the damages stated in the original writ."

Moon on Removal, §98, Note 4.

It is therefore clear that under the amendment of 1887 a counterclaim, even if one had been interposed herein, can have no influence in determining the jurisdictional amount which would work a removal of a case to the Federal Court.

POINT III.

Even had the plaintiff in error in a proper manner and by correct procedure shown that the countreclaim had been properly interposed, in view of the fact that the State Court, in which the defendants in error had sought their remedy, had a limit of jurisdiction to enter judgment for no more than $2,000, the $2,000 limit of jurisdiction was not reached.

The plaintiff's suit was for $800. The defendant's counterclaim, assuming that it had been

interposed, was over $3,000. But the New York City Court's jurisdiction of litigation is $2,000. (Motion papers). So, assuming that the plaintiff-in-error could, by any possibility, recover on his counterclaim, it could not have exceeded the sum of $2,000. Consider with that, the amount of plaintiffs' claim which was $800, it would bring the supposed amount in controversy up to the sum of $2,800, which falls $200 short of the jurisdictional sum.

The Courts of New York have already passed on the question and they have and do hold that under no circumstances may a party enter judgment for more than $2,000 the limit of jurisdiction in the City Court.

> *Lewkowitcz* v. *Queens Aeroplane Co.*, 207 N. Y. 290 (holding N. Y. Civil Code, Sec. 315 unconstitutional).
> *Spitzer* v. *Greens*, 89 Misc. (N. Y.) 882

That being so, under no circumstances could the matter in controversy have exceeded in this litigation the sum of $2,800.

The point is a very serious one and has already been directly passed upon in the District Court. In one case a defendant's plea was for the sum of $3,000, but under the State Statutes he could recover no more than $500. The Court held that $500 was the amount of the matter in dispute, and that the Federal Court could not take jurisdiction under the removing acts, assuming that the Court could consider the counterclaim on the removal.

> *N. Y. & I. B. Co.* v. *Malburn Co.*, 35 Fed. R. 225 (C. C. Tenn.);

The Judge there, in considering the case, said:

> "It appeared there that defendant set up $3,000 counterclaim, but not more than $500 of that claim could have been involved in the Court from which this cause was removed for no larger judgment than that could have been rendered in favor in that (State) Court." (Ref. p. 227)

(See also Hamill v. Hogue 21 Fed. 380 (C.C.))

It thus appears from the record on removal and as well from the papers on this application, that under no circumstances could the matter in controversy in any event have exceeded $2,800.

POINT IV.

The defendants in error did not by appearing and opposing the motion for injunction and thereafter applying to remove, waive their rights or remove the case effectually to the Federal Courts.

These few facts appear unquestioned: The action was begun in the State Court by service of the summons and complaint on October 11th, 1915. The bond and petition on removal were filed in the State Court on October 16th, 1915. A notice of motion was given on the same day to the plaintiff in error herein that the defendants in error would attempt to set aside the bond and petition on removal. As a result of that application an order was made in the State Court on October 25th, 1915, setting aside the pretended removal and permitting the State Court to continue on with the case. That the plaintiff in error being then in default, a judgment was en-

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tered against him on October 25th, 1915, for $882.78 (Transcript of Record, Print p.1).

It is unquestioned that up to that time no pleading or answer had yet been put in by the plaintiff in error. That as to both parties the State Court's powers had been spent and had resulted in a judgment in defendants in error's favor. It is not understandable how the plaintiff in error herein can urge that by his subsequently and on October 27th, 1915 (transcript of record, print. p. 89), securing an order from the Federal Court to stay defendants in error from proceeding under their judgment (which attack against their judgment they were compelled to defend, in default of which their judgment would have been nullified as the demand for the relief by such order to show cause shows (transcript of record, print. p. 90), followed by the suggestion of Judge Lacombe, who granted the motion that the defendants in error would relieve themselves of the injunction by applying for a remand of the case, which suggestion was also contained in the order (transcript of record, print. p. 38-39), which advice they followed, and upon their application, the court remanded the case as appears from the opinion of Judge Hough (transcript of record, print. p. 91), that such defensive and protective acts have placed defendants in error in such a position that all the benefit that they secured by the determination of the City Court prior to their warding off the attack in the District Court had gone to naught. Had defendants in error not taken the steps they did, in the District Court, they would have been confronted with the fact that a waiver of their right to go back to the State Court was waived.

Todd v. *Cleveland & M. R. R. Co.*, 65 Fed. 145.

All the authorities that we have been able to consult have uniformly held that such acts of protection or defence do not waive any right of any party to a litigation.

Crane Co. v. *Guanica Centrale*, 132 Fed. 713 (C. C. N. Y.);
Todd v *Cleveland & M. R. R. Co.*, 65 Fed. 145;
Hill v. *Woodland Amusement Co.*, 155 Fed. 530, 534;
Mo. K. & T. Ry. Co. v. *Chappell*, 206 Fed. 688 (S. C. Okl.);
Olds Wagon Works v. *Benedict*, 67 Fed. 1;
Tierney v. *Helvetia Swiss Co.*, 126 App. Div. (N. Y.) 446.

As stated in this Court as recently as June, 1916,

> "Nothing was accomplished by the Removal proceedings. The District Court did not take jurisdiction under them, but on the contrary, by its remanding order adjudged that they were unauthorized. That order is not subject to review either directly or indirectly, but is final and conclusive."

Pacific Live Stock Co. v. *Ore. Water Board*, 241 U. S., 440, at p. 447.

There might have been room for argument that a waiver was effected had defendants in error instituted proceedings or steps in the District Court *before* they had established their right to an adjudication setting aside the bond and petition on removal and the retention of the case in

the State Courts. Their rights by the order of Judge LaFetra were fixed, determined and established, and no act of theirs occurring subsequently would waive what they were already entitled to and working under. The Court had continued with the case, the clerk had entered judgment, and the right to the judgment up to the moment of its entry had already been fixed and was entered properly when plaintiff in error was in default and it cannot be gainsaid that their subsequently defending against attacks on their judgment made in the District Court by plaintiff in error would in the slightest degree affect any rights that had already been determined and fixed.

A waiver of their right to the judgment cannot be spelled out in such fashion.

The appeal taken by the plaintiff in error is therefore wholly frivolous and apparently taken for delay only and is obviously without merit; and the appeal should be dismissed and the determination of the State Court affirmed.

If, however, the Court concludes that the appeal should be heard, the questions involved being solely jurisdictional ones, it is submitted that the Court should advance the cause under Rule 32 or place the case on the summary docket of this Court.

Respectfully submitted,

JACOB W. HARTMAN,
Attorney for Defendant-in-error

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916.

BALTRUS S. YANKAUS,
Plaintiff-in-Error,
against
MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN,
Defendants-in-Error.

No. 407.

BRIEF FOR PLAINTIFF-IN-ERROR.

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New York City.

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Supreme Court of the United States

BALTRUS S. YANKAUS, Plaintiff-in-Error, against MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN, Defendants-in-Error.	October Term, 1916. No. 407.

Statement of Facts.

This is a writ of error to review the judgment of the City Court of the City of New York, and also an order of the same Court which denied a motion to set aside this judgment, and an order of the Appellate Term of the Supreme Court of the State of New York which affirmed the said order and judgment.

The plaintiffs and defendant below are attorneys at law, and the action was commenced in the City Court of the City of New York by the plaintiffs, residents and citizens of the State of New York, for the recovery of a contingent counsel fee of Five hundred ($500) dollars alleged to have been promised by the defendant, Mr. Yankaus, now plaintiff-in-error, to one of the plaintiffs, now defendants-in-error, and for loans of $200 and $100 respec-

tively. The summons and complaint were served on October 11, 1915. The defendant is and was at that time a resident and citizen of the State of New Jersey, and he accordingly on October 16th, 1915, five days after the service of the summons upon him, duly filed in the office of the Clerk of the City Court of the City of New York a petition and bond for the removal of the cause to the United States District Court for the Southern District of New York. The bond appears at page 13 of the record on appeal, and was duly approved and allowed by a Judge of the City Court (page 15, fol. 16). Due notice of the filing of the petition and bond was on the 15th day of October, 1915, given to the plaintiffs (page 15, fol. 16). The plaintiffs did not appear or object to the removal. The petition for removal appears at page 10, folio 11 of the record and contains all the statements and allegations required by law. Diversity of citizenship is alleged and also that the case is a "suit of a civil nature at common law, and that the District Court of the United States for the Southern District of New York has original jurisdiction under the laws of the United States." The petition goes on to say that the petitioner has a counterclaim exceeding the sum of $3,000, exclusive of interest and costs, and alleges in due statutory form that the "matter and amount in dispute in the above entitled cause of action exceeds the sum or value of $3,000, exclusive of interest and costs." There is also an affidavit by the defendant's attorney, Edward G. Delaney, to the same effect (page 12, fol. 13). Four days thereafter, on October 20, 1915, a certified copy of the record was duly filed in accordance with the law and practice of the United States in the office of the Clerk of the

United States District Court for the Southern District of New York, and within thirty days after the removal thus made, in accordance with the judicial code, there was filed in the office of said Clerk an answer, setting up facts establishing the invalidity of the agreements on which the plaintiffs' chief cause of action was based, and also setting up counterclaims aggregating upwards of $100,000. Prior to the time of the filing of the answer in the United States Court the plaintiffs moved in the City Court of the City of New York, on October 16, 1915, for an order setting aside the bond and the removal of the case to the United States Court and directing that the City Court retain jurisdiction of the action (page 8, fol. 9). The basis for the motion appears in the affidavit of Abraham Rosenstein used in support thereof (page 9, fol. 10), that at that time no answer had been interposed, and that the only statement that the matters in controversy exceeded the sum of $3,000 were contained in the petition for removal and the affidavit which accompanied it. This the plaintiffs claimed to be insufficient for the purpose of removing the action to the United States Court. This motion came on to be heard before Edward B. La Fetra, Judge of the City Court of the City of New York, on the 20th day of October, 1915, and resulted in an order which appears at the top of page 8, setting aside the removal and determining that the action was not one entitled to be removed, and that the City Court declares that it is not and was not properly removable to the United States Court, but that the City Court continued to retain jurisdiction thereof as though no such removal had been attempted or made. The decision upon which this order was made appears at the top of page 20 of

the record and is based upon the assumption that a counterclaim cannot be considered in determining the amount in dispute so far as to give the Federal Court jurisdiction. As soon as this order was signed the plaintiffs entered judgment against the defendant in the City Court of the City of New York for the amount claimed in the complaint, because of his alleged default in not answering in that Court (page 7, fol. 7), and an attachment issued thereon against the property of the defendant (page 87, fol. 134). From this order and judgment the defendant appealed to the Supreme Court, Appellate Term. The action at that time, being in the United States District Court for the Southern District of New York, and being no longer in the City Court, the said judgment was wholly irregular and void, and the defendant, to protect himself from any consequences that might flow therefrom, moved in the United States District Court for the Southern District of New York for an order enjoining and restraining the plaintiffs from proceeding with the enforcement of such judgment. This motion came on to be heard, after due and proper notice to the plaintiffs, before Hon. E. Henry Lacombe, then sitting as District Judge, on the 29th day of October, 1915, and the motion was vigorously opposed by Abraham Rosenstein, one of the plaintiffs in person, as appears from the terms of the order which resulted therefrom, at the top of page 39 of the record. Judge Lacombe, being convinced that the action was in the United States Court until remanded, handed down a decision which appears at page 86, folio 130, which reads in part as follows:

> "Plaintiffs' proper course would have been to make a motion to remand; this he may now do. When such motion is made and granted, the cause may proceed there; it is now here. Plaintiffs are enjoined until remand is made from proceedings further in the State Court."

The order based upon this decision appears at page 38, folio 53 of the record. The opposition of the plaintiffs to the defendant's motion for an injunction in the United States Court is clearly an indication of their admission that the action was actually there at the time they purported to enter their judgment in the City Court, and the decision and order of Judge Lacombe are an unequivocal judicial declaration of the same fact. But the plaintiffs went further. On the 1st day of November, 1915, the plaintiffs moved in the United States District Court for the Southern District of New York to remand the action to the State Court. This motion came on to be heard before Hon. Charles M. Hough, District Judge, and resulted in a decision by him, which appears at page 52, folio 75, and in which he came to the conclusion that the petition of removal did not sufficiently state the defendant's counterclaim, so as to make the matter in dispute in excess of $3,000.00. He therefore granted the motion to remand and an order remanding the cause to the City Court was made on the 15th day of November, 1915 (page 79, fol. 120). The defendant was then faced with a judgment obtained by the plaintiffs in the City Court while the action was, as impliedly admitted by them, in the United States Court. It seemed that the City Court must, as a matter of course, vacate and set aside a judgment so obviously ir-

regular and void, but which the plaintiffs were with impudent inconsistency endeavoring to enforce. The defendant, Mr. Yankaus, thereupon moved to set aside this judgment which had been entered while the suit was pending in the United States Court, and prior to the remand. The notice of motion and affidavits which accompanied it appear on pages 81 to 88, folios 122 to 136. The opposing affidavit appears at page 88, folios 137 to 145. This motion came on to be heard before Judge Schmuck, and was denied by him in the opinion which appears at page 134, folio 216, in which the learned Justice took the position that the matter had already been virtually decided by Judge La Fetra on the plaintiffs' original motion. Of course, the question which was decided by Judge La Fetra was a very different one from that which was presented in the defendant's motion to set aside the judgment entered while the action was in another court. The order denying the defendant's said motion appears at page 93, folio 145 of the record, and an appeal was thereupon taken from this order to the Supreme Court, Appellate Term. In the meantime, the appeal from the judgment and order of Judge La Fetra, setting aside the removal and declaring that the cause was still in the City Court, came on to be heard before the Appellate Term and both the judgment and the order were affirmed (page 27, fol. 34). A motion was then made by the plaintiffs, now defendants-in-error, to dismiss the appeal from the order of Judge Schmuck, denying the defendant's motion to vacate the judgment, on the ground that the questions involved had become academic by the affirmance of Judge La Fetra's order by the Appellate Term. The appeal was accordingly dis-

missed by the Appellate Term. The defendant, Mr. Yankaus, thereupon applied to the Appellate Term for leave to appeal to the Appellate Division for the First Department, from the order affirming Judge La Fetra's order setting aside the removal of the action, and from the judgment entered by the plaintiffs while the action was in the Federal Court, and also from the dismissal of the appeal from Judge Schmuck's order, refusing to vacate this judgment. Both motions were denied (page 54, fol. 78; page 111, fol. 174).

In accordance with the law and practice in the State of New York (Code of Civil Procedure, Section 1334), the defendant then applied to a Justice of the Appellate Division for the First Department for an order permitting him to take the said appeals. These applications were also denied (page 55, fol. 80; page 76, fol. 115). In both of these applications, the defendant set forth that he had been denied rights asserted by him under the Constitution and Statutes of the United States. There was no further move which he could make in the State Courts to obtain the redress to which he was entitled. Accordingly, on or about the 10th day of February, 1916, the defendant, now plaintiff-in-error, duly filed his petition to the Judges of this Court for a writ of error to bring up for review the proceedings mentioned in the said petition (page 137, fol. 222). With the said petition, the defendant, now plaintiff-in-error, duly presented his prayer for reversal and in all particulars complied with the statutes of the United States and the practice of this Court. The said writ of error was duly allowed by the Hon. Charles E. Hughes, then Associate Justice of the Supreme Court of the United States (page 135, fol. 217).

Pursuant to the writ of error, a citation in the said action was duly issued out of this Court (page 135, fol. 219) and was duly served, together with the writ of error and supersedeas bond upon each of the plaintiffs (pages 136, 7, fols. 220, 221).

Upon the hearing in this Court and upon the said writ of error, the defendant, now plaintiff-in-error, will rely upon the following allegations and assignments of error, and upon each and every one thereof, and now again hereby makes and files this, his assignment of errors herein:

FIRST.—The Appellate Term of the Supreme Court of the State of New York, for the First Department, erred in refusing to reverse the judgment in the action below entered in the office of the Clerk of the City Court of the City of New York, on October 26th, 1915, for the reason, amongst other reasons, that at the time of the entry of said judgment, the said action was then duly removed to the District Court of the United States, for the Southern District of New York, pursuant to Sections 28 and 29 of the United States Judicial Code, and said City Court had no power and no jurisdiction over the said cause.

SECOND.—The City Court of the City of New York erred in entering said judgment in the action below, for the reason, amongst other reasons, that at the time of the entry of said judgment the said action had been duly removed to the District Court of the United States, for the Southern District of New York, pursuant to the said statute, and said City Court had no power and no jurisdiction over the said case, and the subject thereof, as the said cause was at that time in the United

States District Court for the Southern District of New York.

THIRD.—The said Appellate Term erred in refusing to reverse the paper purporting to be an order entered in the Clerk's office of said City Court at the direction of Mr. Justice La Fetra, on October 25th, 1915, which purported to set aside the removal of said action to the District Court of the United States, for the reason, amongst other reasons, that at the time of the entry of said judgment the said action had been removed to the District Court of the United States, for the Southern District of New York, and said City Court had no power and no jurisdiction over the said case, in view of the fact that Section 28 of the United States Judicial Code, provides in part as follows:

> "Whenever any cause shall be removed from any state court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the District Court, so remanding such cause shall be allowed."

And in view of the fact that Section 29 of the United States Judicial Code, provides in part as follows:

> "It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit. * * * And the cause shall then proceed in the same manner, as if

it had been originally commenced in the said District Court."

FOURTH.—The said City Court erred in denying the motion made by the plaintiff-in-error to set aside the said judgment of the City Court, for the reason, amongst other reasons, that at the time of the entry of said judgment, the said action had been duly removed to the said District Court of the United States, and said City Court had no power and no jurisdiction over said case at the time said judgment was entered, in view of the fact that Section 28 of the United States Judicial Code, provides in part as follows:

> "Whenever any cause shall be removed from any State Court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the District Court, so remanding such cause shall be allowed."

And in view of the fact that Section 29 of the United States Judicial Code, provides in part as follows:

> "It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit. * * * And the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

FIFTH.—The Appellate Term of the Supreme Court of the State of New York for the First Department and the City Court of the City of New York erred in failing to hold that the City Court of the City of New York was divested of jurisdiction over the action herein after the filing of a bond duly allowed by a Judge of the said Court and a petition for removal, proper and correct in form, and in failing to hold that the action was thereupon ipso facto removed to the United States District Court, for the Southern District of New York, in view of the fact that Section 28 of the United States Judicial Code, provides in part as follows:

> "Whenever any cause shall be removed from any State Court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution and no appeal, or writ of error from the decision of the District Court, so remanding such cause shall be allowed."

And in view of the fact that Section 29 of the United States Judicial Code, provides in part as follows:

> "It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit. * * * And the cause shall then proceed in the same manner, as if it had been originally commenced in the said District Court."

SIXTH.—The Appellate Term of the Supreme Court of the State of New York for the First Department and the City Court of the City of New York erred in failing to hold that the said City Court was divested of jurisdiction over the action herein after the filing of a bond duly approved, and a petition for removal, which said petition set forth facts entitling the defendant to have the said action removed to the United States District Court for the Southern District of New York, in view of the provisions of Sections 28 and 29 of the United States Judicial Code, and in failing to hold that the attachment of the property of the defendant below on said judgment was a violation of his rights under the Constitution of the United States, and particularly subdivision 1 of the Fourteenth Amendment thereof.

SEVENTH.—The City Court of the City of New York erred, contrary to the provisions of Sections 28 and 29 of the United States Judicial Code, in holding that it had power to make any orders, enter any judgments or take any steps in this action after the filing of the petition herein for removal and the approval of the bond thereon and the removal thereupon made to the United States District Court for the Southern District of New York, and the Appellate Term of the Supreme Court of the State of New York for the First Department erred in failing to reverse the said holding of the City Court, and the said order and judgment entered by it while the said action was pending in the United States Court.

EIGHTH.—The City Court of the City of New York erred in failing to hold that the proper

forum to test the sufficiency of the petition for removal, under Sections 28 and 29 of the United States Judicial Code, was the United States District Court, and in failing to hold that it was without jurisdiction to determine the said question or to vacate the removal or to enter judgment or to make any orders or take any steps in the action after it had been removed to the United States Court prior to the time of remand, and the Appellate Term of the Supreme Court of the State of New York for the First Department erred in failing so to hold, and in failing to reverse the order and judgment entered by the said City Court as aforesaid.

NINTH.—The Appellate Term of the Supreme Court of the State of New York for the First Department, and the City Court of the City of New York erred in refusing to follow the decision of the United States District Court for the Southern District of New York, to the effect that the action was in the said United States Court at and after the time of the entry of the judgment and the making of the order aforesaid in the said City Court, and in failing to hold that the said order of the United States District Court, enjoining and restraining plaintiffs from proceeding with the action in the City Court or endeavoring to enforce the judgment therein obtained, was a judicial declaration of the said United States Court that the action was at said time in the said Court and not in the City Court of the City of New York, and in failing to give effect to the said decision and order and in failing to hold that the said City Court was without jurisdiction to make the order and judgment as aforesaid.

TENTH.—The Appellate Term of the Supreme Court and the City Court of the City of New York, erred in failing to hold that the acts of the plaintiffs below in failing to object to the removal of the said cause in the United States Court after due notice had been given them, and in opposing the defendant's motion for an injunction in the United States Court, and in moving the United States Court to remand the action, waived any and all rights which they may have had to to claim that the action was still pending in the City Court of the City of New York at the same time and conceded and admitted the action was in the United States Court at the time of the making of the aforesaid order and of the entry of the aforesaid judgment and were thereby precluded from maintaining that the said order and judgment were either legal or valid.

ELEVENTH.—The Appellate Term of the Supreme Court of the State of New York for the First Department and the City Court of the City of New York, erred in failing to hold that the said action was one which could properly be removed to the United States District Court, under the laws and the practice of the United States, and that upon the filing of the petition and bond as aforesaid the City Court of the City of New York was divested of jurisdiction over the cause and without power to vacate the removal or to make any order, or enter any judgment therein.

TWELFTH.—The Appellate Term of the Supreme Court of the State of New York for the First Department, erred in dismissing the appeal of the plaintiff in error from the said order of the City

Court of the City of New York, denying his motion to vacate and set aside the aforesaid judgment entered while the action was in the United States District Court for the Southern District of New York for the reason, amongst others, that the statutes of the State of New York and the Constitution of the United States, and the statutes and law of the United States, gave to this plaintiff-in-error the right to have the said appeal heard and to have the said order reversed by the said Appellate Term.

WHEREFORE, plaintiff-in-error prays that each of the said judgments and orders be reversed with costs.

Dated, New York, , 1916.

BALTRUS S. YANKAUS,
By Roger Foster,
55 Liberty Street,
New York City.

POINT I.

The City Court of the City of New York was without jurisdiction of this action after the filing therein of a petition for removal to the United States District Court for the Southern District of New York, and a bond approved by a Judge thereof and both proper and correct in form.

The question in dispute in this case is very simple. It amounts to this: Was the action pending in the City Court of the City of New York or

in the United States District Court for the Southern District of New York when the judgment was entered against the defendant? If the action was not in the City Court at that time unquestionably the judgment was void and of no effect, and the attempt to enforce it by putting an attachment on the defendant's bank account (page 87, fol. 134) would deprive the defendant of his rights without due process of law in violation of sub-division 1 of the Fourteenth Amendment of the United States Constitution. For the purpose of determining where the action was at the time of the entry of this judgment, this Court must decide whether or not any effect can be given to the determination of the City Court that it was still there, and the attempt on its part to vacate and set aside the removal. Various other points are involved, but in one way or another they all resolve themselves down to the simple question of where this action was at the time of the entry of the judgment. It would seem as though it should not be necessary to go beyond the simple wording of the statute. Section 28 of the Judicial Code of the United States provides in part as follows:

> "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought in any State Court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. * * *

> And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district. Whenever any cause shall be removed from any State Court into any District Court of the United States and the District Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed."

And Section 29 of the Judicial Code of the United States provides as follows:

> "Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition, duly verified, in such suit, in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit into the District Court, to be held in the district

where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court, if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also, for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit.

Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid, in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

An inspection of the record herein will show that the defendant, now plaintiff-in-error, complied literally with all the requirements thereof. On the face of his petition duly verified and filed before the expiration of the six days in which he was required to answer, accompanied by a bond duly approved by a Judge of the City Court, there was set forth the diversity of citizenship be-

tween the plaintiffs and the defendant, the statement that the suit was of a civil nature at law, of which the District Court of the United States for the Southern District of New York has original jurisdiction under the laws of the United States, and the further statement that the matter and amount in dispute exceeded the sum or value of $3,000.00, exclusive of interest and costs. By way of explanation of this last fact, the defendant stated in his petition that the amount in dispute exceeded the sum of $3,000.00 exclusive of interest and costs, because of a counterclaim which the petitioner claimed to be due and owing from the plaintiffs.

The duty of the State Court is distinctly set forth in Sections 28 and 29. Upon the filing of the petition and bond, the State Court must except the removal and proceed no further in the suit, but on the contrary, the cause shall then proceed in the same manner as if it had been originally commenced in the United States District Court, subject of course, to the right of the United States Court to remand to the State Court, under Section 28. The language of this statute is so plain that it is difficult to understand on what theory it can be claimed that the action remained in the City Court after the steps above enumerated were taken by the defendant. Reading the Removal Act as a whole, it is obvious that the intention of Congress was to prevent the sort of friction between State and Federal Courts which has arisen in the case at bar. The orderly administration of the Courts requires that one or the other of the tribunals shall be the judge of whether or not the statute has been complied with and the action properly removed to the Fed-

eral Court. Congress has, by enacting Sections 28 and 29 of the Judicial Code, decided that this duty shall devolve upon the United States Court, and it is submitted that if the petition appears on its face to comply with the statute, that the action is *ipso facto* by the filing of the petition and bond removed to the Federal Court, and that it cannot again be in the State Court until duly remanded.

This question was long ago settled by Mr. Justice Nelson in *Freeman* vs. *Howe*, 24 How., 250. The language used by the Supreme Court of the United States in the case of *Marshall* vs. *Holmes*, 144 U. S., 589, states the general rule so far as concerns the interpretation of this statute:

> "After the filing of the petition for removal accompanied by a sufficient bond and alleging that the controversy was wholly between citizens of different states the State Court was without authority to proceed further in the suit, if, in its nature, it was one of which the Circuit Court of the United States could rightfully take jurisdiction. If under the act of Congress the cause was removable then upon the filing of the above petition and bond it was in law removed so as to be docketed in that Court, notwithstanding the order of the State Court refusing to recognize the right of removal."

And again, at page 601:

> "It was not, however, for the State Court to disregard the right of removal upon the ground simply that the averments of the petition were insufficient or too vague to justify a court of

> equity in granting the relief asked. The suit being in its general nature one of which the Circuit Court of the United States could rightfully take cognizance, it was for that Court, if the cause was docketed there, and upon final hearing to determine whether under the allegations and proof, a case was made."

There is in the last mentioned case a clear recognition of the principle here contended for that where a petition sets forth jurisdictional allegations the State Court cannot further concern itself with the action unless and until the Federal Court sees fit to remand it. Otherwise, there would exist the double system of interpretation and decision which Congress sought to avoid, and of which there could be no better example than the present case. There is some conflict of authorities in the Federal Courts as to whether or not a counterclaim can be considered in making up the jurisdictional amount, and the City Court of the City of New York has presumed to pass upon this question and has held that a counterclaim cannot be so considered in the face of numerous decisions of this Court, and that therefore the petition of the defendant below was not sufficient and that therefore the removal should be set aside. If the State Courts are to be permitted to determine such questions as these, there is nothing left for the Federal Court to decide on a motion to remand, and the statute is rendered nugatory. Of what avail is it for Congress to provide that the State Court shall proceed no further with the suit if the State Court is to be at liberty to determine questions of Federal Law and to resolve them against a non-resident defendant seeking to exercise his right to go before the United States Courts?

POINT II.

The City Court of the City of New York was without jurisdiction of this action, after the filing therein of a petition for removal and a bond duly approved by a Judge thereof, upon due notice to the plaintiffs, which said petition set forth facts entitling the defendant to have the case removed to the United States District Court for the Southern District of New York.

It has already been pointed out that the petition and bond filed by the defendant below were proper in form and it is the contention of the plaintiff-in-error that the City Court of the City of New York had no power to do anything except to examine the form of these papers, and that upon approving the bond and filing the petition as in this case, the City Court was divested of jurisdiction and the action *ipso facto* removed to the Federal Court. There are statements in some opinions of this Court which would indicate that the State Court has a right to examine the petition and to determine whether or not the action is a removable one. The leading case on this subject seems to be:

> *Madisonville Traction Co.* vs. *St. Bernard Mining Co.*, 196 U. S., 239, where the Court said at page 244:

> "If a case be a removable one, that is, if the suit, in its nature be one of which the Circuit Court could rightfully take jurisdiction, then upon the filing of a petition for removal in due

> time with a sufficient bond, the case is, in law, removed, and the State Court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. * * * The fundamental question here is whether the case brought in the County Court was a removable one. If it was, then the decree of the Circuit Court restraining the Traction Company from taking steps in the local Court, after the removal of the case to the Federal Court was right; but if the case was not a removable one, then the decree was erroneous."

To construe the language of the United States Supreme Court, to mean that the State Court has complete power to determine the final fact as to whether or not a case is removable would be to nullify Section 29 of the Judicial Code. The only thing that the Federal Court can be asked to pass upon on a motion to remand is whether or not the cause is a removable one and whether or not it was properly removed; in other words, the two questions of substance and form. Surely these questions cannot also be left to the determination of the State Court. It is contended that when this Court said that the fundamental question was whether the case was a removable one, it meant no more than that the State Court possessed the right to determine whether or not the petition contains on its face allegations stating a case which, in the nature of things, could be removed. Numerous decisions will be cited on behalf of the defendants-in-error in support of their theory that the State Court is made the arbiter of all questions concerning the right to remove. A careful inspection of these

cases will show that in each one the petition failed to state on its face allegations which would bring the case within the Federal Statutes. For example, in the case of Chesapeake & Ohio R. R. Co. vs. Cockrell, 232 U. S., 146, an action had been commenced by the plaintiff in the State Court against a foreign corporation and two resident individual defendants. The corporation filed a bond and petition for removal, stating that the individuals were made defendants fraudulently, so as to prevent the removal to the Federal Court. The State Court denied the petition for a removal, and the defendant proceeded with the trial in the State Court. A verdict was had for the plaintiff and the defendant corporation appealed to the Supreme Court of the United States. This Court properly held that the petition contained a mere conclusion that the individuals had been fraudulently made parties, and that it did not therefore state on its face such facts as would give a Federal Court jurisdiction, two of the three defendants being citizens of the same State as the plaintiff. Of course, if these essential jurisdictional allegations are lacking, the State Court is never divested of its jurisdiction. To the same effect is the case of *Iowa Cen. R. R. Co.* vs. *Bacon*, 236 U. S., 305, where the Court upheld a judgment of the State Court after an attempted removal, saying at page 310:

> "The case now under consideration was not upon the face of the record a removable one. The prayer for recovery was $1,990 and consequently the amount required to give jurisdiction to the Federal Court was not involved. The filing of the petition and bond did not therefore effect a removal."

In the present case the record shows clearly on its face that the matter in dispute exceeds the sum of $3,000.00 exclusive of interest and costs. It has even been held that these jurisdictional allegations need not be set forth in the petition so long as they appear from the record.

> *National Steamship Co.* vs. *Tugman,* 106 U. S., 118, at page 122.

Another case frequently cited as standing for a proposition contrary to that which is here urged by the plaintiff-in-error is *Stone* vs. *State of South Carolina,* 117 U. S., 430, but which as a matter of fact illustrates exceptionally well the meaning of this Court when it said that the fundamental question was whether or not the action was removable. In the Stone case the Court said:

> "A state Court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. * * * The mere filing of a petition for the removal of a suit which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State Court in the case ends and that of the Circuit Court begins."

But in that case the allegations of the petition were on their face insufficient to show that a Fed-

eral Court had any jurisdiction whatever, as appears from the opinion of the Court where it said:

> "There is no statute which authorizes the removal of a suit between a state and citizens on the ground of citizenship, for a state cannot in the nature of things be a citizen of any state."*

In other words, the point which is here made is this: If the State Court has any power to determine whether or not a case is removable, this power must be strictly limited to a reading of the allegations of the petition and a comparison with the requirements of the statute. If the one checks with the other the State Court has no further concern with the action. In the case of *Stone* vs. *State of South Carolina* (supra), the Court said:

> "All issues of fact made upon the petition for removal must be tried in the Circuit Court."

See also,

Ayres vs. *Wiswell*, 112 U. S., 187.
Kern vs. *Huidekoper*, 103 U. S., 485.

Even assuming that the allegations in the petition for removal were merely conclusions of law, still they were such as conform to the requirements of the Judicial Code, and it is well settled that when the jurisdictional facts are stated generally, informally or in the form of conclusions either in the petition or in the record, an amendment may be allowed by the Federal Court for the purpose of correcting such defects.

Ayres vs. *Watson*, 113 U. S., 594, at page 598.

Martin's Adminstrator vs. *Baltimore & Ohio R. R.*, 151 U. S., 673, at page 691.

Mexican Cen. Ry. vs. *Duthie*, 189 U. S., 76.

Kinney vs. *Columbia Savings & Loan Ass'n*, 191 U. S., 78.

Glover vs. *Shepperd*, 15 Fed., 833.

Robertson vs. *Scottish Ins. Co.*, 68 F., 173, at page 177.

Johnson vs. *Austin Mfg. Co.*, 76 Fed., 616.

People's Tel. Co. vs. *East Tenn. Telephone Co.*, 193 F., 212, at page 213.

Stadelman vs. *White Line Towing Co.*, 93 Fed., 209.

Woolridge vs. *McKenna*, 8 Fed., 650.

And so in *Tremper* vs. *Schwabacher*, 84 Fed., 413, permission was given to amend a petition which set forth that two of the defendants were residents of a City in a certain State, but omitted to state specifically that they were citizens of that State as well, and in *Walser* vs. *Memphis Ry. Co.*, 19 Fed., 152, permission was given to amend a petition which alleged that the case arose under the Constitution and Laws of the United States, without specifying the facts, showing that to be the case, and in *Carr* vs. *Fife*, 156 U. S., 494, a motion to remand was made upon the ground that the petition for removal did not show that the value of the matter in dispute exceeded $2,000.00. The Circuit Court permitted the defendant to amend the record by affidavit, showing that the matter in dispute did exceed the jurisdictional amount, and then denied the remand. The Supreme Court of

the United States affirmed the ruling of the Circuit Court, saying at page 497:

> "If the record were defective in the particular mentioned, we think that the amendment by affidavits, disclosing that the value of the matter in dispute largely exceeded the jurisdictional amount, cured the defect."

Clearly then the failure to state specifically the facts upon which the defendant based his counterclaim was no such defect as to entitle the said Court to pass upon the question as to whether or not the action was a removable one.

POINT III.

The proper forum to test the sufficiency of the petition for removal was the United States District Court, and the State Court was without jurisdiction to determine this question or to vacate the removal or to enter judgment until after the case had been remanded.

At the outset, it is important to observe that as this Court said that in *Kern* vs. *Huidekoper*, 103 U. S., 485, at page 492:

> "Upon the question of removal it is entirely immaterial whether or not the suit as an original action could have been maintained in the Federal Court."

As has already been pointed out, there was nothing for the State Court to pass upon, except the

form of the petition and bond, and the question as to whether or not it contained the allegations required by the Federal statute. After that the plaintiffs' remedy was clearly in the Federal Court, the procedure of which the plaintiffs in this case thereafter availed themselves. In *National Steamship Co* vs. *Tugman*, 106 U. S., 118, there is a clear, concise statement of the point which is here made. The Court said:

> "The petition was accompanied by a bond which it is conceded conformed to the statute and was ample as to security. Upon the filing, therefore, of the petition and bond the suit being removable under the staute, the jurisdiction of the State Court absolutely ceased and that of the Circuit Court of the United States, immediately attached. The duty of the State Court was to proceed no further in the cause. Every order thereafter made in that Court was coram non judice unless its jurisdiction was actually restored. * * * Whether the Circuit Court of the United States should retain jurisdiction or dismiss or remand the action * * * was for it, not the State Court to determine. Nor was the jurisdiction of the State Court restored when the company subsequently consented to the order requiring the issue to be heard and determined be a referee selected by the parties, or when it appeared and contested the case as well before the referee as in the State Court up to final judgment. The right of the company to have a trial in the Circuit Court of the United States became fixed upon the filing of the petition and bond."

And in the recent case of the *Chesapeake & Ohio R. R. Co.* vs. *McCabe*, 213 U. S., 207, this Court said at page 214:

> "The Circuit Court of the United States, having taken jurisdiction of the case upon the removal, and having refused to remand it and proceeded to judgment should the State Court, when that judgment was offered to be pleaded before it, have given effect to the judgment? That is the Federal question presented in this case. It is insisted for the defendant-in-error that the right of removal depends upon the presentation to the State Court of a proper petition for removal, which petition should contain the essential allegations necessary to make it a case under the statute for that purpose, and that unless this is done the jurisdiction of the State Court is not divested. * * * That the Circuit Court of the United States may determine the question of the right of removal is conclusively shown by the terms of the statute governing the subject. * * * It is apparent that these provisions are entitled to confer jurisdiction upon the United States Circuit Court, to determine for itself the removability of a given cause. * * * We think it was the intention of Congress to confer upon the Circuit Court of the United States, a right to determine the removability of a cause, independently of the jurisdiction and determination of the State Courts."

A very excellent discussion of the whole subject appears in the case of *Miller* vs. *Soule*, 221 Fed., 493, at page 497:

"Where the jurisdictional facts exist and are properly pleaded and all the requirements of the law are met, the legal consequence is that the cause is in contemplation of law removed and thereafter all further proceedings in the State Court become null and void. In this sense, the workings of the system are automatic and the cause is *ipso facto* removed. It is easily possible, however that there may be a difference of opinion between the parties or indeed between the Courts of the State and of the United States, whether this legal consequence in a given case follows. It is supposable that a party plaintiff for instance may dispute the removability of the cause and deny the legal consequence above stated. * * * No legal conclusion can be reached as to jurisdiction until the fact upon which it rests is determined and that fact must be determined by one or the other of the Courts concerned. It is settled that the Court to determine this fact is the District Court. Burlington vs. Dunn, 122 U. S., 513. Where the issue is one of law upon the facts as they appear of record it must be determined upon the state of the record as it was at the time of the petition filed. But if sufficient grounds of removal appear from the whole record amendments may be allowed as to all matters merely model or formal. Powers vs. Ry. Co., 169 U. S., 92."

It is scarcely necessary to state that this action could not be pending in more than one Court at a time. It is clear and undisputed that a petition alleging jurisdictional facts and a proper bond were filed. It follows that the action was thereafter in

the Federal Court, until remanded as a result of the plaintiffs' motion in the Federal Court. Whatever was done in the meantime in the City Court could not possibly have any validity, but the fact remains that there is a judgment apparently valid standing against the plaintiff-in-error and based upon an illegal and unwarranted order of the City Court, purporting to set aside the removal and that the highest Courts of the State of New York, to which he could have recourse have denied to the plaintiff-in-error his right to have the order and judgment vacated, reversed and set aside. Moreover the property of the plaintiff-in-error has been seized by an attachment on said judgment (page 87, fol. 134). The question is far from an academic one, and this Court is earnestly requested to exercise its power for the protection of this plaintiff-in-error, and for the purpose of upholding the dignity of the United States and its Courts in the protection of rights secured by the Constitution and Laws of the United States, which require that the jurisdiction of the Federal Courts shall be enforced and that all orders of the State Courts which show disrespect to the same, shall be set aside.

U. S. Revised Statutes, Section 709.

Gordon vs. *Longest*, 16 Peters, 97.

Kanouse vs. *Martin*, 14 How., 23 and 15 How., 198.

Oakley vs. *Goodnow*, 118 U. S., 43.

Mo. Pacific Ry. Co. vs. *Fitzerald*, 160 U. S., 566, at page 582.

M. K. & T. Ry. Co. vs. *Warehouse Commissioners*, 183 U. S., 53.

So. Ry. Co. vs. *Allison*, 190 U. S., 326.

Cincinnati Ry. Co. vs. *Vohon*, 200 U. S., 221.

POINT IV.

The decision of the United States District Court that the action had been removed and its injunction order restraining the plaintiffs from proceeding in the State Court are conclusive that the State Court had no jurisdiction to vacate the removal or to enter judgment.

Little need be said on this point. As has already been pointed out, after the attempted setting aside of the removal by the City Court, and the entry of judgment by the plaintiffs long before the action was remanded by the Federal Court, the defendant below moved in the Federal Court for an order restraining the plaintiffs from proceeding in the State Court. In his opinion Judge Lacombe ventured to suggest that as there was doubt as to the jurisdiction of the Federal Court, by reason of the counterclaim, the case should be remanded. This was purely obiter. He did grant the injunction and he did say "The case is now here," page 86, folio 130. If the case was there it was not in the City Court and the order and judgment of the City Court were, therefore, void. Not only was the decision of Judge Lacombe res judicata upon the question, but the dignity of the United States Courts requires that this Court shall uphold his decision, from which no appeal was ever taken, and which stands unaffected on the records of the United States District Court for the Southern District of New York. For this Court to uphold the action of the City Court in attempting to set aside the removal and to give judgment before

the action had been remanded, would be in effect to nullify the decision of Judge Lacombe in this action.

POINT V.

The acts of the plaintiffs in failing seasonably to object to the removal after notice, and in contesting the motion of the defendant below for an injunction in the Federal Court, and in moving the Federal Court to remand the action, constituted a waiver of whatever rights the plaintiffs may have had to claim that the action was not removed, and an admission that at the time of the entry of the judgment the action was in the United States Court.

It may be claimed on behalf of the defendants-in-error that jurisdiction cannot be given to the United States Court by consent and attention may be called to the New York case of *Tierney* vs. *Helvetia Ins. Co.*, 126 App. Div., 446.

Whatever of dictum there may be in that case contrary to the contention here made, it must be regarded as overruled by the decision of this Court in the case of *Mackay* vs. *Uinta Development Co.*, 229 U. S. 173. In that case, an action was commenced in the State Court for $1950. The defendant Mackay answered, and the Company then filed an amended petition and Mackay thereupon amended his answer, setting up a counterclaim of $3,000. Plaintiff Development Company thereupon filed a bond and petition for removal which

was granted on the theory that the amount in dispute as disclosed by the counterclaim exceeded $2000. A transcript was filed. Both parties appeared and an answer to the counterclaim was put in. The case was tried in the United States Court and judgment rendered for the plaintiff. The case was appealed to the Circuit Court of Appeals and the following question certified to this court:

> "Assuming that the removal at the instance of Mackay was not in conformity with the removal statute and assuming that as respects his claim against the Development Co. all the jurisdictional elements were presented which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such action the Development Co. lawfully could have set up its claim as a counterclaim and thereby have enabled the Court to take cognizance thereof, did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment then with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Co. of its claim as a counterclaim?"

This Court said, at page 175:

> "This question must be answered in the affirmative and that fact makes it unnecessary

to consider the status of the parties in the State Court and who was the technical plaintiff and who the technical defendant, or whether Mackay, a non-resident defendant, sued in a State Court for $1950, could by filing a counterclaim for $3000, acquire the right to remove the case to the United States Court. The case was removed in fact, and while the parties could not give jurisdiction by consent, there was the requisite amounts and the diversity of citizenship necessary to give the United States Circuit Court jurisdiction of the cause. * * * Removal proceedings are in the nature of process to bring the parties before the United States Court. As in other forms of process, the litigant has the right to rely upon the statute and to insist that in compliance with its terms, the case shall be taken from the State to the Federal Court in the proper district, on motion of the proper person at the proper time and on giving the proper bond. But these provisions are for the benefit of the defendant and intended to secure his appearance. When this result is accomplished by his voluntary attendance the Court will not of its own motion inquire as to the regularity of the issue or service of process—or indeed whether there was any process at all, since it could be waived in whole or in part, either expressly or by failing seasonably to object. (Powers vs. Ry Co., 169 U. S. 92, 98). What took place in the State Court may be disregarded by the Court because it was waived by the parties, and regardless of the manner in which the case was brought or how the attendance of the parties in the Unit-

ed States Court was secured, there was presented to the Circuit Court a controversy between citizens of different states in which the amount claimed by one non-resident was more than $2000, exclusive of interests and costs. As the Court had jurisdiction of the subject matter the parties could have been realigned by making Mackay plaintiff and the Development Company defendant, if that had been found proper."

The above case is in many respects similar to the one at hand. While the question before the Court in the present case is not concerned with the regularity of the proceedings in the Federal Court, the analogy is quite clear. Surely, if the Federal Court has jurisdiction where the amount in disqute is in excess of $3000, solely by reason of a counterclaim there can be no question that this action was actually removed to the Federal Court and that the City Court was completely divested of jurisdiction. It follows that the judgment of the City Court must be absolutely void and of no effect. Moreover, if the steps taken by the defendant below to have the cause removed were for any reason insufficient it naturally follows that the Federal Court having jurisdiction of the subject matter, the plaintiffs below were able by their acts to confer jurisdiction of their persons. That they did so by failing to object to the removal when notice of it was received by them, by opposing the motion of the defendant below in the Federal Court and by moving in the Federal Court to remand, can scarcely be disputed. They conceded that the action was in the Federal Court at the time, otherwise there would be nothing to

remand. The Mackay case (supra) is conclusive that the Federal Court has general jurisdiction of the subject matter of this case. The most, therefore, that can be said for the plaintiff's contention is that there were some irregularities in the papers on removal, which did not suffice to bring the case in the Federal Court. The answer is that the plaintiffs below waived all such irregularities and themselves voluntarily appeared in the Federal Court, and thereby acknowledged that the action was there.

POINT VI.

The cause was actually a removable one under the Federal statutes, and having been properly removed, the City Court of the City of New York was without jurisdiction to vacate the removal or to enter judgment.

The act of Judge Hough in remanding this action from the Federal Court for the reasons stated in his opinion on page 52, folio 75, is in no sense conclusive upon the plaintiff-in-error that a counterclaim pleaded such as this cannot be considered in determining the Federal jurisdiction. Unfortunately, this decision could not be appealed from and the plaintiff-in-error has had no opportunity to have any other Court pass upon this question. The decision was, however, in effect, a holding that the counterclaim was defectively pleaded because of a failure to set forth the facts upon which it was based, and that the Court would not permit an amendment so as to have the said facts properly

set forth. Obviously this was clearly a discretionary decision and the Court expressly refrained from passing upon the question of whether or not a counterclaim could be considered in making up the jurisdictional matter. For the purposes of this case it is quite unnecessary for this Court to pass upon that question. The only question here presented is whether the action was removed to the Federal Court during the period between the filing of the petition and bond and the remand. If it was, the order and judgment of the City Court are void. It is possible, however, for the plaintiff-in-error to go further. Assuming that the requirements are that the petition must set forth a state of facts which shall not only on their face, but from a legal interpretation, entitle the petitioner to a removal, then it is the contention of the plaintiff-in-error that this was done in the present case. It would seem to be well settled that a counterclaim between the parties in the action which arises out of and is connected with the causes of the action set forth in the complaint, must be considered in determining the amount of the matter in dispute. A complete discussion of this subject would vastly encumber this brief with reference to a question which the Court will probably deem it unnecessary to pass on. In support of this proposition the following cases may be cited:

Export & Import Lumber Co. vs. *Port Lumber Co.*, 237 U. S., 388.
Mackay vs. *Uinta Co.*, 229 U. S., 173.
Harten vs. *Loffer*, 212 U. S., 397.
Kirby vs. *Am. Soda Fountain Co.*, 190 U. S., 141.

Buckstaff vs. *Russell,* 151 U. S., 626.
Block vs. *Darling,* 140 U. S., 234.
Bradstreet vs. *Higgens,* 112 U. S., 227.
Hilton vs. *Dickenson,* 108 U. S., 165.
Ryan vs. *Bindley,* 1 Wall., 66.

It has, moreover, been held that the amount in controversy can be determined from the whole record, including the petition, so that there is no necessity of the defendant filing an answer, setting forth his counterclaim before the removal takes place.

Export & Import Lumber Co. vs. *Port Lumber Co.* (supra).
Hilton vs. *Dickenson* (supra).
Lovell vs. *Cragin,* 136 U. S., 130.
Squire vs. *Roberston,* 191 Fed., 733, at page 736.

In the following cases it has been held that the presenting of a counterclaim by the defendant, as in the present case, of an amount suffiicient to give the Federal Court jurisdiction, entitles the defendant to remove.

Lee vs. *Continental Ins. Co.,* 74 Fed. 424.
N. Y. I. & P. Co. vs. *Milburn Co.,* 35 Fed., 225.
Clarkson vs. *Manson,* 4 Fed., 257.

Two cases to the contrary which ignore the general principle laid down by this court and what would seem to be the plain wording of the statute are:

La Montagne vs. *The Harvey Lumber Co.*, 44 Fed., 645.

Falls Wire Mfg. Co. vs. *Broderick*, 6 Fed., 654.

Another class of cases of which *Crane Co.* vs. *Guanico Centrale*, 132 Fed., 713, is an example, have been remanded because there is some doubt on this subject. In his memorandum Judge Hough admitted the unsatisfactory quality of such a decision. It is difficult to see what the defendant below could have done in order to protect his rights to remove, if the decision of Judge Hough is to stand. Had the defendant below filed an answer and counterclaim in the State Court before filing his petition for removal, there is respectable authority for the proposition that he would then have waived his rights to remove.

Bennet vs. *Divine*, 45 Fed., 705.

It would seem that all he could do was to state in his petition that there was such counterclaim, and if necessary, in the Federal Court the petition could be amended so as to state the facts. In any event, it is quite clear that a counterclaim can and should be considered in determining the amount in dispute, and that the action was therefore a properly removable one and was duly removed to the Federal Court so as to deprive the City Court of the City of New York of any further jurisdiction or power therein.

POINT VII.

The decision of the Appellate Term of the Supreme Court of the State of New York, First Department, should be reversed, and the order and judgment of the City Court of the City of New York, entered upon the remittitur from the said Appellate Term, and the order of the City Court of the City of New York purporting to set aside the removal of the cause, and the judgment thereafter entered in favor of the plaintiffs below against the defendant below in the said Court, and the attachment of the property of the defendant below issued on the said judgment, and the order of the said City Court denying the motion of the defendant below to vacate and set aside said judgment, should be reversed, vacated and set aside.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1916.

BALTRUS S. YANKAUS,
Plaintiff-in-Error,

against

MOSES FELTENSTEIN and
ABRAHAM ROSENSTEIN,
Defendants-in-Error.

No. 407

BRIEF FOR DEFENDANTS-IN-ERROR.

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Supreme Court of the United States

BALTRUS S. YANKAUS,
Plaintiff-in-Error,
against
MOSES FELTENSTEIN and ABRAHAM ROSENSTEIN,
Defendants-in-Error.

Statement of Facts.

This is a writ of error to review the orders of the State Courts of New York, which had denied plaintiff-in-error's application to set aside a judgment rendered in favor of the defendants-in-error and against him.

Defendants-in-error would have found it unnecessary to review the facts were it not for the fact that the plaintiff's statement of facts is partly erroneous and likewise omits matter which may be important in the determination of this appeal.

The defendants-in-error instituted an action in the City Court of the City of New York, a Court of inferior institution of the State of New York (Record, page 35, fol. 48), to recover the sum of $800, $500 thereof being the amount of a counsel fee and the balance for loans made to the plaintiff-in-error (page 3, fols. 4-7). The plaintiff-in-error was

served with summons and complaint in that action on October 11, 1915, and before his time to answer that suit expired, plaintiff-in-error filed, on October 16, 1915, with the City Court clerk, a petition and bond on removal (page 10, fols. 11-16). A day prior thereto a notice was given by the attorney for the plaintiff-in-error that such bond and petition would, on the next day, viz.: October 16, 1915, be filed by him in the office of the Clerk of the City Court of the City of New York (page 15, fol. 16).

On the very same day that notice was given defendants-in-error served papers on an application to said City Court, returnable at a specified time and place, for an order setting aside said petition and bond and the alleged removal of the cause to the Federal Court and directing that the City Court retain jurisdiction of the action and that the petition on removal be rejected and that the City Court adjudge that the action was not a removable one (page 8, fols. 9-11).

The ground of that application was, as expressly stated in the motion papers, that the action was one commenced in the City Court to recover but $800 and that the matters in controversy involved that amount only and therefore was not a removable one, and further that at the time the petition was filed no answer or counterclaim had been served, and that the petitioner had merely stated that the amount in dispute in the action exceeded $3,000, the defendant claiming a counterclaim to be due and owing from the plaintiffs therein, and that even if there had been such a counterclaim interposed for more than $3,000, the counterclaim could not be considered in determining the "amount in controversy" or dispute, but that the complaint

was the only pleading which guided the Court in the determination of that question, and that therefore the attempted removal was inefficacious, invalid, irregular and void (page 9, fols. 10-11).

The application in the City Court was heard and resulted in an opinion handed down by Mr. Justice La Fetra, of that Court, granting the motion in favor of defendants-in-error and determining that the facts set forth in the petition on removal fail to show that the amount in dispute exceeds $3,000 and that the amount involved in a proposed counterclaim could not be considered in such determination (page 20, fol. 21). Upon that decision an order was made on October 25, 1915, setting aside the attempted removal and determining that the action was not one entitled to be removed to the Federal Court and declaring that the action was not a removable one and that the City Court continue to retain its jurisdiction of the action as though such removal had not been attempted or made (page 7, fol. 8).

There being no answer interposed in the action in the City Court, and upon an affidavit showing briefly the foregoing facts, default in pleading a judgment was entered on October 26, 1915, in the City Court for the sum of $882.78, which was the amount sued for besides interest and costs (page 6, fol. 7).

It appears that up to the time of the entry of judgment, plaintiff-in-error *had not filed an answer* in any Court, nor had plaintiff-in-error *taken any steps* in the Federal Court subsequent to filing the petition and bond on removal until October 27, 1915, when plaintiff-in-error herein applied to the United States District Court in New York and secured an ex parte order to show cause, returnable

October 29, 1915, why the judgment creditors should not be enjoined and restrained from prosecuting their City Court action and why the aforesaid judgment and order of the City Court and all proceedings thereunder should not be vacated, set aside and declared null and ineffectual and for other relief.

On such application defendants-in-error herein appeared and opposed the same (page 78, fol. 117), and as a result thereof Judge Lacombe, at Circuit, wrote an opinion in which he stated that jurisdiction was too doubtful to warrant the Federal Court in retaining the cause and that the proper course for defendants-in-error to pursue would be to move for a remand which they could then do, and that in the meantime the judgment creditors would be enjoined from proceeding further in the State Court until the application on remand was heard (page 90, fol. 140). Upon that decision an order was made by Judge Lacombe, in which judgment creditors were restrained from proceeding with their judgment in the City Court until the further order of the District Court made upon notice to remand the cause (page 78, fol. 118). The Court made *no* determination declaring ineffectual or void the order or judgment of the City Court.

Following promptly the suggestion and course pointed out by Judge Lacombe in his decision, and in order to relieve themselves from the stay and restraint imposed by Judge Lacombe's decision and in the order which followed it, in which it was expressly declared that the stay was to remain effective until the Court's order on the motion to remand, defendants-in-error applied in the United States District Court in New York for a remand.

stating briefly the foregoing facts and occurrences, and after opposition on the part of the plaintiff-in-error Judge Hough, who heard the motion, handed down a decision which appears in the record, in which the Court determined that a remand should be had (page 52, fols. 75-76; page 133, fols. 213-214). Upon that opinion the Court entered an order remanding and returning the cause to the City Court with costs (page 79, fol. 120).

It appears that an answer was filed in the Federal Court verified November 8th, 1915 (page 22, fol. 27; page 122, fols. 193-209).

It appears that after Judge Lacombe had signed the order of stay, plaintiff-in-error herein served a notice of appeal to the Appellate Court of the City Court, appealing both from the order of Judge La Fetra retaining the cause in the City Court, as well as from the judgment entered in the City Court (page 90, fol. 140). That appeal subsequently came on for hearing in the Appellate Term of that Court, and the order of Mr. Justice La Fetra was affirmed, and the appeal from the judgment was dismissed (page 27, fol. 34). A judgment on that decision was entered on December 16th, 1915 (page 28, fol. 36).

An application was thereupon made by plaintiff-in-error herein to that Appellate Court for leave to appeal to the next higher Appellate Court, which motion was denied by an order of the Appellate Term on December 31st, 1915 (page 54, fol. 78). Thereupon plaintiff-in-error applied to the next higher Appellate Court itself for its permission to appeal to it from the order of the lower Court, and that application was also denied (page 76, fol. 115).

Prior to these determinations, and about November 30th, 1915, plaintiff-in-error had also applied to the City Court to vacate and set aside the said judgment upon the ground that when the judgment was entered in that Court the action had been removed, and on other grounds springing out of that contention, but completely ignoring the fact that the City Court had already determined that the action had not been effectually removed and that the action continued therein (page 81, fols. 122, 135-136). That application was also opposed and resulted in the entry of an order denying that motion (page 93, fol. 145). From that order plaintiff-in-error also took an appeal to the Appellate Term (page 94, fol. 146). An application being made by defendants-in-error to dismiss that appeal, showing that the precise questions had already been passed upon and had been adjudicated in the prior appeal (page 95, fols. 148-150), said Appellate Court granted the motion and dismissed the appeal (page 99, fol. 155). Thereupon plaintiff-in-error applied to the Appellate Term for leave to appeal to the next higher Appellate Court (page 100, fol. 157), which application was opposed, and that motion was also dismissed (page 111, fol. 174). Then plaintiff-in-error applied to the next higher Appellate Court itself for leave to appeal to it for the said order denying the application to vacate the judgment (page 112, fol. 176), which application also was opposed and resulted likewise in a denial of the motion (page 121, fol. 190).

This in brief is precisely the progress of the steps taken by the plaintiff-in-error in the State and Federal Courts. The slovenly method of assorting the various papers in the different proceed-

ings taken below, necessitating the consideration of a jumble of papers assembled in almost hopeless confusion, impels us to indicate clearly to the Court, as we do above, the various pages of the record which show the divers steps and applications taken and had in these proceedings. The plaintiff-in-error presents to this Court, after his "Statement of Facts," his Assignments of Error which is improperly placed in the brief, and is entitled to no consideration by this Court as none was ever filed in the proper time or place, and appears for the very first time in the brief. (Rule 21.)

In discussing the points involved, we will attempt to answer the points as raised by the plaintiff-in-error.

POINT I.

The New York City Court had complete jurisdiction of the action after the filing of the pretended petition for removal to the Federal Court.

As plaintiff-in-error states, the question in the case is a very simple one. It is, whether a State Court is ousted of jurisdiction in case a jurisdictionally defective petition and record on removal is filed. If the "record" on removal in this case was proper and sufficient, then the City Court had no power to continue with the case. If it was insufficient, our contention is that the State Court could continue with the cause undisturbed.

The question is not, as the plaintiff-in-error states it, as to the status of the parties at the time

of the *entry* of the judgment (Plaintiff's Brief, page 16), but as to the time when the petition and bond were filed, viz., on October 16, 1915. To determine that, the "record" on removal must be examined to ascertain the sufficiency of the attempted removal from all of the proper papers composing such record. As plaintiff states it, the question is controlled by the United States Removal Acts (§§28, 29, 24, of the Judicial Code).

Under such Sections, there may be removed by the defendant any suit "of which the District Courts of the United States *are given original* jurisdiction by this title" (§28). And "whenever any party *entitled* to remove any suit mentioned in the last preceding section" (§29), he may file a petition before the defendant's time to answer expires under the State Laws. The section last quoted from, further states that it shall *"then"* be the duty of the State Court to accept the petition and proceed no further in said suit.

That provision has a simple and plain meaning. The duty of the State Court to stop "then" could only mean in a case where the party is "entitled" to remove the case under the provisions of Section 28. It must follow, therefore, that if the party is not entitled to remove, the State Court's jurisdiction does not cease. The "original jurisdiction" provided in Section 28 is set forth in Section 24 of the Judiciary Act. There the Federal Courts are given jurisdiction of suits "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and * * * is between citizens of different States."

The question naturally narrows itself down as to whether the "record" on removal showed that the matter in controversy in the State Court suit

exceeded the sum or value of $3,000. As is shown by our cases under Point II, if the record on removal is jurisdictionally defective, the State Court has a right to continue with the suit undisturbed and also to inquire into the question of the sufficiency of the record, though, of course, not excluding a similar inquiry on the part of the Federal Court.

The plaintiff cites in this point the case of Marshall vs. Holmes, 141 U. S., 597. His very quotation from the opinion (page 20), indicates that what was there said, referred *only* to a case where the petition affected a suit which "in its nature it was one of which the Circuit Court of the United States could rightfully take jurisdiction"—a proposition which is indisputable. In that case the facts stated in the petition and record unquestionably made removal imperative. In that case it appeared that a plaintiff had obtained a number of judgments against the same defendant, each judgment being for $500. The defendant instituted a proceeding to vacate all of the judgments because they were secured by fraud and deceit under facts and circumstances which could not be presented in the suits themselves. The aggregate of the judgments exceeded $3,000, whereupon the defendant filed a petition and bond on removal and the question came up as to whether the sum or value in controversy exceeded $3,000, and the Court held that it did. Nothing in that case that we are able to find militates in the slightest degree against the position we contend for.

No suit is removable under the Removal Statute unless it be one that plaintiff could have originally brought in the United States Court.

Re Wisner, 203 U. S., 449.
McLaughlin vs. Hallowell, 228 U. S., 278, 290.
Ivanoff vs. Mech. Rubber Co., 232 Fed., 173.

The plaintiff-in-error is fearful of the fact that the authority of the State Courts should not be allowed to conflict with the jurisdiction of the Federal Courts, but he forgets the fact that under a uniform and uninterrupted line of decisions which are cited in Point II, this Court has always recognized the right of the State Courts to determine concurrently with the Federal Courts the question of the sufficiency of the record on removal. For the purpose of this argument, the undersigned concede that the determination of the Federal District Court respecting the sufficiency of a record on removal takes precedence over the authority of a State Court's ruling to the contrary respecting the sufficiency of the same record on removal.

As shown in Point VI, subd. E herein, the clear intent of the amendment of 1888 respecting removal to the Federal Courts has been to contract the jurisdiction of the Federal Courts and limiting it to only such cases as are clearly removable under such amended Act. So much have the Federal Courts recognized this as a cardinal guide that they have repeatedly held that where the question of jurisdiction of the Federal Court is doubtful, the Federal Court itself, nevertheless, remands the case back to the State Court.

Crane vs. Guanica Centrale, 132 Fed. Rep., 713.

POINT II.

The City Court had a right to continue with this action even after the filing of the bond and petition on removal, and the State Court, concurrently with the Federal Court, had a right to determine the sufficiency of the record on removal.

In opening his argument under this point, plaintiff-in-error proceeds on the assumption that his petition and record on removal was proper in form and sufficient to give the Federal Court jurisdiction. But he presupposes a fact which is absolutely denied and disputed, and which petition, as is shown further on, is wholly and absolutely insufficient.

The very first case that the plaintiff-in-error cites in his favor and which is truly the leading case on the subject, propounds rules which are not at all in accord with plaintiff's view of its effect. The case referred to (Madisonville Traction Co. vs. St. Bernard Mining Co., 196 U. S., 239), where the entire practice on removal is discussed, and which has never been question, limited or modified, and which has the following headnote written by the Court and a reiteration of the opinion itself, presents the following propositions on the practice of removal:

> "In regard to the removal of cases the following principles have been settled: If the case be a removable one, that is, if the suit, in its nature, be one of which the Circuit Court could rightfully take jurisdiction,

then upon the filing of a petition for removal in due time, with a sufficient bond, the case is, in law, removed and the State Court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. * * *

"*If upon the face of the record, including the petition for removal, a suit does not appear* to be a removable one, then the State Court is *not bound to surrender* its jurisdiction, and may proceed as if no application for removal had been made.

"Under the judiciary act of 1887, 1888, a suit cannot be removed from a State Court unless it could *originally* have been *brought* in the Circuit Court of the United States."

This case merely iterated in assembled form what had been the uninterrupted and uniform practice respecting the removal of cases.

Stone vs. *South Carolina*, 117 U. S., 430;
Burlington vs. *Dunn*, 122 U. S., 513;
Harradi vs. *Vardrey*, 172 U. S., 148, 160;
Hill vs. *Woodland Amusement Co.*, 158, Fed., 530;
Carson vs. *Height*, 118 U. S., 276;
Powers vs. *Chesapeake R. Co.*, 169 U. S., 92;
Stevens vs. *Nichols*, 130 U. S., 230;
Achore vs. *Ry. Co.*, 131 U. S., 240;
Todd vs. *Cleveland, etc. Ry. Co.*, 65 Fed., 145;
Goin vs. *So. Pac. R. R.*, 198 Fed., 432 (D. C. Cal.).
Wehore vs. *Ohio & M. Ry. Co.*, 131 U. S., 240.

All the lower Courts since the *Madisonville* case, have followed the rule and upheld the State Courts continuance of jurisdiction unless the record on appeal shows the removability of the case.

City of Montgomery vs. *Postal Telegraph*, 218 Fed. (D. C. Ala.), 471;
Miller vs. *Soule*, 221 Fed., 493 (D. C. Pa.);
Goin vs. *So. Pacific Railroad*, 198 Fed., 432 (D. C. Cal.);
Mo., K. & T. Ry. vs. *Chappell*, 206 Fed., 688 (D. C. Okl.);
Springer vs. *Howes*, 69 Fed., 849.

In the cases plaintiff-in-error cites there was no question as to the sufficiency of the record on removal, and the Court's views expressed in such cases either assumed that the petitioners were "entitled" to remove the cases, or the sufficiency of the petitions was not questioned. Such, for instance, are cases like:

Kern vs. *Huidekoper*, 103 U. S., 845;
Burton vs. *Pa. Lumber Co.*, 221 Fed., 775;
Donovan vs. *Wells Fargo & Co.*, 169 Fed., 362;
Southern Railroad vs. *Koontz*, 104 U. S., 14;
Stone vs. *So. Carolina*, 117 U. S., 430.

These and other cases prohibit the State Court in the words of the statute, not to proceed further with the case, but only where the removability is unquestioned.

In National Steamship Co. vs. Tugman, 106 U. S., 118, cited by plaintiff, the suit also was a re-

movable one, as the only question there was as to whether certain acts of the movant effected a restoration of the case which had been properly removed, the Court holding that it did not have such effect.

> "Before a party can avail himself of it (the right of removal) *he must show upon the record* that his is a case which comes within the provisions of the statute. His petition for removal when filed becomes a part of the record in the case which should state facts, which taken in connection with such as already appear, entitled him to the transfer. *If he fails in this, he has not in law shown* to the Court that it could not 'proceed further with the case.'"

Insurance Co. vs. *Pechener*, 95 U. S., 182.

As repeated again by this Court

> "when a petition for removal of a cause to the Circuit Court of the United States is filed in a cause pending in a State Court, the State Courts are at liberty to consider the actual facts, as well as the law arising on the face of the record after the presentation of the petition for removal. Of course the issues of fact made upon petition for removal can only be tried in the District Court, but *the State Court may determine for itself whether on the face of the record a removal must be had.*" (Citing *Railroad Co.* vs. *Ramsey*, 22 Wall., U. S., 322.)

Burlington vs. *Dunn*, 122 U. S., 513.

And, as again stated in one of the above cited cases, a "mere filing of the petition for the removal of a suit *which is not removable* does not work a transfer. To accomplish this, the suit must be one that may be removed, and the petition must show a right of the petitioner to demand the removal."

Stone vs. *South Carolina*, 117 U. S., 432.

The question that the State Court determines is one purely of law. That is, admitting the facts recited in the petition on removal to be true, does it appear on the face of the record that the petitioner is entitled to removal?

Donovan vs. *Wells Fargo Co.*, 169 Fed., 633.

Were there any doubt on the question, the matter is wholly put at rest by a *decision of this Court* handed down only this year, which had before it the following facts for determination:

A petition set forth that plaintiff had asked only for judgment in the sum of $1,900 and the answer set up that defendant, a Railroad Company, was a citizen of a different State and alleged that the amount in controversy exceeded the jurisdictional sum, and after various applications, it appeared that the State Court continuing jurisdiction of the case, had rendered a judgment in favor of plaintiff. An appeal was taken to the highest Court of the State, where the judgment was affirmed. The case was then brought to this Court on the ground that a Federal question was pre-

sented. This Court, after presenting those facts, observes as follows:

> "It was of course essential to the removal of the case that the amount in controversy should have been sufficient to give the Federal Court jurisdiction; that is to say, $3,000, exclusive of interest and costs. The State Court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action, notwithstanding the statement that the State had suffered damage in the sum of $10,000.
>
> "It is contended that, nevertheless, the proceedings in this case show that the case was removed to the United States Circuit Court and inasmuch as the State Court lost jurisdiction, its subsequent proceedings are null and void.
>
> "In *Madisonville Traction Company* vs. *Mining Company*, 196 U. S., 239, this Court said, citing many previous cases, that certain principles relating to the removal of causes had been settled by the former adjudications of the Court. One is that if the suit be one in which the Circuit Court could rightfully take jurisdiction, then upon the filing of the petition for removal in due time, with sufficient bond, the case is in law removed, and all subsequent proceedings therein are void. Furthermore, that *if upon the face of the record, including the petition for removal, the suit does not appear to be removable, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application*

for removal had been made. See also the previous cases in this Court cited in the Traction Company Case, at pages 244 and 245.

"Applying these principles, it is apparent that the case now under consideration was not upon the face of the record a removable one. The prayer for recovery was for $1,990, consequently the amount required to give jurisdiction to the Federal Court was not involved. *The filing of the petition and bond did not therefore effect a removal of the case.*"

Iowa Central Ry. Co. vs. *Bacon*, 236 U. S., 305, at page 309.

The State Courts when retaining jurisdiction after filing a removal petition have merely followed out the rules and practice of the Federal Courts.

Tierney vs. Helvetia Swiss Fire Ins. Co., 126 App. Div. (N. Y.), 446;
Orr vs. *Baltimore & Ohio R. R. Co.*, 83 Misc., 221 (N. Y.);
Republican Fire Insurance Co. vs. *Keogh*, 23 Hun, 466 (N. Y.).

Where the Federal and State Courts have concurrent jurisdiction, the tribunal whose jurisdiction *first* attaches holds it to the exclusion of the other.

Harradi vs. *Vardrey*, 172 U. S., 148, 160.

The State Court having in this case been the earlier Court and having jurisdiction with the Federal Courts on the question, it had a right to determine that the record on removal was jurisdictionally and wholly defective, even though

plaintiff-in-error forced the issue into the Federal Courts, by securing an injunction resulting in the subsequent motion for remand, the Federal Court likewise holding the record as jurisdictionally defective (pages 52, 90; fols. 75, 140).

The line of cases cited by the plaintiff-in-error which allow an amendment to a petition to correct defects therein, certainly do not sweep away the right of the State Court to determine the sufficiency of the record on removal made in the State Court, for there is no case cited which allows an amendment by permitting a jurisdictionally defective petition to add facts conferring jurisdiction. Besides, in this case, from the nature of the jurisdictional defects urged no amendment that can be conceived can add, change or modify the facts which the defendants-in-error contend for. Further, in this case, the question of amendment is purely academic, because at no time was there any request made or relief granted to permit an amendment which would cure the defect. In fact, the position of the plaintiff-in-error is that there is no defect in the record.

POINT III.

The sufficiency of the petition on removal may be determined by the State Court as well as the Federal Court, and if found jurisdictionally defective the State Court may continue with the case as though no petition had been filed.

This point has been quite fully discussed under the last point (Point II). The several cases cited

under Point III by the plaintiff-in-error in no way militate against our position, for the very excerpts printed in his brief show that the suits involved in those decisions were removable, and we make no dispute to the proposition that if the case is a removable one the jurisdiction of the State Court ceases instantly.

For instance, in the case of Kern vs. Huidekoper, the Court held that the applicant was entitled to a removal and all acts of the State Court from that time on became void.

So in the case of National Steamship Co. vs. Tugman, the Court expressly stated that "the suit being removable under the Statute" stopped the State Court from proceeding further.

Likewise, in Chesapeake & Ohio Railroad Co. vs. McCabe, it was shown that the record on removal presented proper facts. This case in fact expressly follows the Madisonville Traction Co. vs. St. Bernard Mining Co. case, and merely holds that the State Courts cannot preclude a Federal Court from determining for itself the question of the sufficiency of a petition. The Court also expressly conceded (at page 217) the right of the State Court to likewise determine the same question for its own purposes.

So in Miller vs. Soule, their extract from the opinion starts out with the very proposition that "where the jurisdictional facts exist and are properly pleaded and all the requirements of the law met," removal is effected and the State Court's subsequent acts therein in continuing with the suit are void.

It is clear from all the authorities that the jurisdiction of both Courts are concurrent; admitting the further fact, however, as stated in the Chesa-

peake vs. McCabe case, that the Federal Courts have "a right to determine the removability of a case independently of the jurisdiction and determination of the State Courts."

POINT IV.

The decision of the Federal Court referring to removal practice, did not have the effect of taking the case into the Federal Court and take away the further jurisdiction of the State Court in the matter.

After defendants-in-error had entered their judgment, plaintiff-in-error herein instituted proceedings in the United States District Court in New York by an order to show cause, returnable for hearing on a day certain, restraining and enjoining the defendants-in-error herein from proceeding with or prosecuting their judgment entered in the City Court, and to vacate, set aside and declare null and void the said judgment (page 78, fols. 117-118). Judge Lacombe at Circuit heard the application and made a written decision (page 90, fol. 140) in which he expressed doubt of the Federal Court's jurisdiction in the matter, and suggested that judgment-creditors move to remand and incidentally and purely as obiter dicta observed that this cause was in the Federal Court and that the cause may proceed in the State Court when the motion to remand is made and granted. The Court's decision, however, in no way granted applicant's request for leave that the judgment should be vacated and set aside, and in the order

that the Court subsequently made, no reference was made to the fact that the case was still in the Federal Court, but a stay was granted preventing defendants-in-error from collecting their judgment or proceeding therewith "until the further order of this Court, made upon proper notice and motion on the part of the plaintiffs, to remand said cause" (page 78, fol. 118).

What occurred on the argument of the motion, and which led up to the opinion of the Court, is disclosed in the record (page 70, fol. 105), and as asserted there, Judge Lacombe made no effort to go into the question any further than to decide that the question of removability ought to be thoroughly thrashed out in that court on a motion to remand, and he granted a temporary stay until the motion to remand was made, and his brief opinion indicates that he merely skimmed the surface of the question, leaving it to the remand application to recover the entire question. To him was not at all given the question for adjudication as to whether the State Court had concurrent jurisdiction or otherwise (page 71, fol. 106). Defendants-in-error promptly followed the Court's advice, and applied to the District Court for a remand, and there is presented in full in the record on this appeal Judge Hough's opinion directing a remand because the "record" showed that the attempted removal was jurisdictionally defective (page 133, fol. 213).

It is not claimed that there is a judgment or order of the Court which declares specifically that the case was then properly in the Federal Court, and Judge Lacombe's dicta, as can be seen from the context of his opinion, never intended to de-

prive the State Court of a continuance of its jurisdiction, but merely stayed its action until a proper ruling be made respecting the question on an express motion to remand.

It is our contention that at no time was this case in the Federal Court or pending therein. That is clearly the purport of a most *recent decision* in this Court:

> Pacific Live Stock Co. vs. Oregon Water Board, 241 U. S., 410, at pages 445-447.

The Court held there that after an equity suit of injunction was begun enjoining the Oregon Water Board from proceeding to ascertain and adjudicate rights of various claimants to water of a river in that State, the plaintiff presented to that Board a "bond and petition for the removal of the proceed-"ing to the District Court of the United States "upon the ground that it was a suit between citi-"zens of different States. But the *attempted* re-"moval was not sustained, for the District Court "remanded the proceeding and in that connection "held that while it was pending before the board "it was essentially preliminary and administra-"tive and not a suit at law or in equity within the "meaning of the removal statute * * *. Upon "the assumption that the removal proceedings "were effective * * * plaintiff insists that the "continued prosecution of the proceedings be-"fore the board constituted an inadmissible inter-"ference with the District Court's jurisdiction, "and that this jurisdiction should be maintained "and protected by an appropriate injunction. The "insistence must be overruled because the assump-"tion upon which it rests cannot be indulged.

"Nothing was accomplished by the removal pro-"ceedings. The District Court did not take juris-"diction under them, but on the contrary, by its re-"manding order adjudged that they were un-"authorized. That order is not subject to review, "either directly or indirectly, but is final and con-"clusive (citing Removal Statute and other cases)."

The opinion just cited effectually disposes of the contention plaintiff-in-error makes under this point.

POINT V.

The defendants-in-error have committed no acts which waive their right at any time to proceed in the City Court.

We take it that plaintiff-in-error's contending, under this point, is based on three several acts of the defendants-in-error, which he claims preclude them from maintaining their contention that the City Court had a right to continue with the action in said City Court. One of the alleged acts of waiver is the fact that the removal was after due notice to the defendants-in-error and their failing to object to the removal. This might give the impression that a hearing had been had and the Judge at the City Court had approved the removal proceedings. This is wholly misleading, for the only notice that is claimed in the record, and which was the only notice in fact given, was that on October 15, 1915, a mere notification was given that the defendant in that action would, the next day, file with the Clerk of the City Court his petition and bond on removal (page 15, fol. 16).

It is absurd to think that defendants-in-error could have prevented the filing of these papers, for the notice did not bring on any hearing or proceeding before the Court or any Judge thereof by which the defendants-in-error could have prevented their filing. The plaintiff-in-error could have, and in fact did, during some part of the day that he selected, file these papers with the City Court Clerk. The defendants-in-error *could not have prevented* the filing, and they in fact did not lose one moment in instituting the proceedings in the City Court to vacate the pretended removal, for they prepared and served papers to vacate and set aside the *very same day* that the bond and petition were filed with the City Court (page 8, fols. 9-10).

The remaining two acts of the defendants-in-error which are claimed to preclude the defendants-in-error from questioning the Federal Court's jurisdiction is that the defendants-in-error opposed the plaintiff's application for injunction before Judge Lacombe and in following Judge Lacombe's advice to apply for a remand, which they did. Let us see if that has that effect:

The action was begun in the State Court by service of the summons and complaint on October 11th, 1915. The bond and petition on removal were filed in the State Court on October 16th, 1915. A notice of motion was given on the same day to the plaintiff-in-error herein that the defendants-in-error would attempt to set aside the bond and petition on removal. As a result of that application an order was made in the State Court on October 25th, 1915, setting aside the pretended removal and permitting the State Court to continue on with the case. That the plaintiff-in-er-

ror being then in default, a judgment was entered against him on October 25th, 1915, for $882.78 (page 72, fol. 7).

It is unquestioned that up to that time no *pleading or answer* had yet been put in by the plaintiff-in-error. That as to both parties the State Court's powers had been spent and had resulted in a judgment in defendants-in-error's favor. It is not understandable how the plaintiff-in-error herein can urge that by his subsequently and on October 27th, 1915 (page 89 fol. 139), securing an order from the Federal Court to stay defendants-in-error from proceeding under their judgment (which attack against their judgment they were compelled to defend, in default of which their judgment would have been nullified as the demand for the relief by such order to show cause shows (page 90, fol. 140), followed by the suggestion of Judge Lacombe, who granted the motion that the defendants-in-error would relieve themselves of the injunction by applying for a remand of the case, which suggestion was also contained in the order (pages 38-39, fols. 52-53), which advice they followed, and upon their application, the Court remanded the case as appears from the opinion of Judge Hough (page 91, fol. 141), that such defensive and protective acts have placed defendants-in-error in such a position that all the benefit that they secured by the determination of the City Court prior to their warding off the attack in the District Court had gone to naught. Had defendants-in-error not taken the steps they did, in the District Court, they would have been confronted with the fact that a waiver of their right to go back to the State Court was effected.

Todd vs. *Cleveland & M. R. R. Co.*, 65 Fed., 145.

All the authorities that we have been able to consult have uniformly held that such acts of protection or defence do not waive any right of any party to a litigation.

Re Wisner 203 U. S., 449 (at page 452);
Crane Co. vs. *Guanica Centrale*, 132 Fed., 713 (C. C. N. Y.);
Todd vs. *Cleveland & M. R. R. Co.*, 65 Fed., 145;
Hill vs. *Woodland Amusement Co.*, 155 Fed., 530, 534;
Mo. K. & T. Ry. Co. vs. *Chappell*, 206 Fed., 688 (D. C. Okl.);
Olds Wagon Works vs. Benedict, 67 Fed., 1;
Tierney vs. *Helvetia Swiss Co.*, 126 App. Div. (N. Y.), 446;
Bacon vs. *Iowa Central Ry.*, 137 N. W. Rep., 1011.

The attempted removal proceedings were abortive and the situation is just as though no such proceedings ever took place.

As stated in this Court as recently as June, 1916.

> "*Nothing was accomplished by the Removal proceedings. The District Court did not take jurisdiction under them, but on the contrary, by its remanding order adjudged that they were unauthorized. That order is not*

subject to review either directly or indirectly, but is final and conclusive."

Pacific Live Stock Co. vs. *Ore. Water Board*, 241 U. S., 440, at page 447.

There might have been room for argument that a waiver was effected had defendants-in-error instituted proceedings or steps in the District Court *before* they had established their right to an adjudication setting aside the bond and petition on removal and the retention of the case in the State Courts. Their rights by the order of Judge LaFetra were fixed, determined and established, and no act of theirs occurring subsequently would waive what they were already entitled to and working under. The Court had continued with the case, the clerk had entered judgment, and the right to the judgment up to the moment of its entry had already been fixed and was entered properly when plaintiff-in-error was in default and it cannot be gainsaid that their subsequently defending against attacks on their judgment made in the District Court by plaintiff-in-error would in the slightest degree affect any rights that had already been determined and fixed.

The plaintiff-in-error cites under this point copious abstracts from the decision of Mackey vs. Uinta Development Co., which case bears no similarity of facts to this nor has it any bearing on the question involved herein. In that case both parties *tried out the issues*, no objection was interposed by the appellant, no objection was made to the removal of the action and the parties voluntarily attended the hearings and trial and never

raised any objection. Where is the similarity between that and the circumstances in our case, where defendants-in-error continually and repeatedly opposed all attempts on the part of the plaintiff-in-error to remove the case to the Federal Court, where it never belonged? There was not a solitary move that defendants-in-error could take to prevent plaintiff-in-error on October 16, 1915, from filing with the clerk papers, which the clerk was bound to accept. No order is claimed to have been issued by the Court permitting the filing of such papers. It was only after defendants-in-error had secured their judgment, that plaintiff-in-error instituted a proceeding on injunction and it was incumbent on the defendants-in-error to oppose this move. Judge Lacombe, while not admitting jurisdiction of the case, and even expressing grave doubt concerning it, suggested that the proper move would be for the defendants-in-error to apply for a remand, and following that suggestion and in order to free themselves of the injunction, they followed the course indicated by Judge Lacombe, and upon the matter being brought before the Federal Court under such proceeding, it promptly remanded the case. As Judge Hough's decision shows, the case was never in this Court and never properly there. A waiver of their right to the judgment that defendants-in-error had already entered certainly cannot be spelled out in such fashion.

POINT VI.

The cause was never a removable one, and the State Court very properly continued with the action.

Before discussing the Point, it might be well to call the Court's attention to the fact that the obvious purpose of this appeal is by indirection to appeal from the order of the District Court directing the remand. Under the Removal Statute, this is prohibited. Yet by the method followed by plaintiff-in-error, it is apparent that this appeal is nothing but an attempt to override the order granting the remand, which cannot be accomplished by indirection.

> McLaughlin vs. Hallowell, 228 U. S., 278.
> Pacific L. S. Co. vs. Oregon Water Board, 241 U. S., 410.

The facts in that case bear a resemblance to the procedure followed here. There as here, a writ of error was sued out to review a judgment of the State Court to affirm a judgment of the County Court of Iowa, in which the plaintiff-in-error was a judgment debtor. Plaintiff-in-error alleged that it was entitled to a removal because of a diversity of citizenship, and the defendant showed that the action had once been removed to the Federal Court and by that Court remanded because citizenship under the meaning of the Federal Constitution could not be predicated of a partnership entity, and therefore there could be no such diversity as would fasten original jurisdiction in the Federal Court (at page 290). A subsequent petition for removal

was refused by the County Court where the facts were exactly the same, except that the individual members of the partnership plaintiff-in-error were now before the Court instead of the firm sued as a legal entity. It was the decision of the Supreme Court of Iowa in affirming the judgment of the County Court, notwithstanding such refusal that was assigned as error in this Court (at page 280). This Court held that whatever its views on the matter were, considering the fact that there had been a remand by the Federal Court, it was precluded from questioning the order of remand by this means of indirection, because the Removal Statute prohibits it.

As appears from the record in this case, just that situation has occurred. The defendants-in-error, after procuring their judgment, were, by the affirmative proceeding of the plaintiff-in-error, brought into the Federal Court in which an injunction was issued, and in order to be relieved of that injunction plaintiff-in-error, following the Court's suggestion as a mode of relief, applied and secured the Court's order on remand. With all that, the plaintiff-in-error continued in the State Court himself and prosecuted appeals from the various orders in a further effort to overthrow the City Court's decision and order, and after trying every possible means, he has conceived of this appeal to overthrow by indirection the order of remand.

But whether that is the legal effect of the acts of the plaintiff-in-error or not, it is submitted that the Record on removal herein was wholly jurisdictionally defective. To make our argument clearer it seems essential to sub-divide this point:

A.

The Federal and State Courts have concurrent jurisdiction to determine as to whether a record on removal presents sufficient facts to entitle the cause to be removed; if as a question of law it appears from the face of the papers that they are insufficient, then the State Court continues jurisdiction, never having been ousted therefrom.

This argument has been fully gone into in Point II, and it is unnecessary here to reiterate it, so that if the party is not "entitled" to remove the case, then it follows that the State Court continues with the action as though no petition and bond had been filed.

B.

In considering the sufficiency of a removal the entire "record on removal" is consulted, and in this cause the record includes the summons, complaint, bond and petition on removal.

This rule is an elementary proposition of practice.

Insurance Co. vs. *Pechner*, 95 U. S., 182;
Burlington R. R. Co. vs. *Dunn*, 122 U. S., 513;

Louisville R. R. Co. vs. *Wangelin*, 132 U. S., 601;
Connell vs. *Smiley*, 156 U. S., 337;
Beadleston vs. *Harpendinf*, 32 Fed., 644;
Alabama Ry. vs. *Thompson*, 200 U. S., 206 at page 216;
Atchison Ry. vs. *Phillips*, 176 Fed., 693;
Gillespie vs. *Pocohontas Coal Co.*, 162 Fed., 742;
Helena P. T. Co. vs. *Spratt*, 140 Fed., 310 (C. C. Mont., 1906; Citing a number of cases of this Court).

C.

In determining the removability of a cause, the only pleading in the record which can be considered is the bill of complaint.

This proposition is clearly brought out in a leading text book on the topic.

> "The better reason supports the statement that the sum or value put in issue by plaintiff's complaint determines the question of jurisdiction upon removal, and that a counterclaim by defendant cannot be added to make the jurisdictional amount. * * * That to be removable, a suit must be one which a circuit court of the United States could take *original* jurisdiction under Sec. 1 of the *present* Judiciary Act. It is clear that the sum or value put in *issue by plaintiff's complaint* is under that section the jurisdictional criterion in a suit begun in a United States Circuit Court."
>
> *Moon on Removal* (1901) Sec. 98.

This Court had already enunciated that view of the Amended Statutes.

> "The general policy of the Act of March, 1887 * * * *as is apparent on its face* and has been repeatedly recognized by this Court, was to *contract* the jurisdiction of the Circuit Courts. Those cases and those only were made removable under Section 2, in respect of which original jurisdiction was given to the Circuit Courts by Section 1. Hence it has been settled that a case cannot be removed from a State Court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws or treaties of the United States, unless that appears by *plaintiff's statement of his own claim;* and if it does not so appear, the want of it cannot be supplied by any statement of the *petition for removal or in the subsequent pleadings.* And moreover that jurisdiction is not inferred by the allegation that defendant *intends* to assert a defense based on the Constitution, or a law or treaty of the United States, or under statutes of the United States, or of a State in conflict with the Constitution." (Citing cases.)
>
> *Arkansas* vs. *Kansas Coal Co.*, 183 U. S. 185, 188.

"The *test of the right* of removal *is that the case must be one* which the Circuit Courts might have exercised original jurisdiction under Sec. 1 of the Act of March 3, 1887, as corrected by Act of Aug. 13, 1888. The cases

hold that to give the Circuit Court *original* jurisdiction the Federal question *must appear necessarily in the statement* of plaintiff's cause of action, and not as mere allegations of the defense which the defendants do set up or which they rely upon. *3rd St. Ry. Co.* vs. *Lewis*, 173 U. S., 457."

Boston & Mining Co. vs. *Montana Ore Co.*, 188 U. S., 632, at page 640.

The District Courts have reasserted the rule.

Eisele vs. *Oddie*, 128 Fed., 841.
Hayne vs. *Wolley*, 180 Fed., 573.
Baily vs. *Wooley*, 183 Fed., 1021.

The radical change made by the Removal Act of 1897-8 influenced in a great measure in determining the question of remand when the Record at bar came up for determination in the District Court (page 52, fol. 75).

As stated in a Circuit Court of Appeals case:

"Under the latter (1875) act, it was deemed sufficient for the purpose of removal if the record disclosed the existence of the federal question. The Act of 1888, however, affects a radical change in that respect. The courts *no longer* search the record to ascertain whether the case be removable but confine themselves to examination of the bill, declaration, petition, or complaint of the plaintiff. If the initial pleading of the plaintiff fails to disclose a cause of action arising under a law of the United States, the defendant will not

be permitted to supply the omission by allegation in his petition for removal showing that it is one so arising."

W. G. Coyle Co. vs. *Stern*, 193 Fed., 582 (8 Cir.—1912).

And when we take the converse situation of the proposition we find that "the fact that the plaintiff's pleading shows a sufficient defense to part of his claim to reduce it below the jurisdictional amount does not divest the Court of jurisdiction."

Foster's Fed. Pr. (5th Ed.) Sec. 23,

citing:

Re Metropolitan St. Ry. Receivership, 208 U. S., 90.
Fuller vs. *Metropolitan Life Ins. Co.*, 37 Fed., 163.
Stillwell vs. *Williamson*, 80 Fed., 68.

If the rule were otherwise, the authorities would have declared that by pleading a counterclaim which exceeds the jurisdictional amount, the original plaintiff would be in the same position as a defendant, and he would remove the case to the Federal Court. But the decisions appear to hold the contrary.

Foster's Fed. Pr. (5th Ed.), Sec. 542,

citing:

West vs. *Aurora City*, 6 Wall., 139 (and other cases).

D.

Even were the defendant's plea, counterclaim or set-off allowed to be considered in determining the amount in controversy, if in fact there was no such plea, set-off or counterclaim made a part of the record, it prevents the plaintiff-in-error from using the intended counterclaim as a means of transfer.

It is conceded and in fact it cannot be denied that the alleged counterclaim at the time of the removal on October 16th, 1915, was no part of the record on removal. In fact it was not interposed till long after defendants in error had docketed their judgment in the State Court. The answer itself, which we find a part of the Transcript of Record (page 122, fol. 193), shows that it was verified and interposed on November 8, 1916 (page 132, 22; fols. 208, 27). Plaintiff in error very significantly omits to state the date of its service. Therefore, as it was not a part of the record, it can have no influence on the question even though the petition alleges the existence of an alleged counterclaim of over $3,000.

Under the authorities "the question of removability depends upon the state of the pleadings and the record at the time of the application for removal."

Alabama S. Ry. Co. vs. *Thompson*, 200 U. S., 206, at page 216.

The right to remand must be determined as a matter of strict right depending on the record as it was when the petition for removal was presented.

Miller vs. *Soule*, 221 Fed., 493 (D. C. Pa.).

Even though the petition shows an *intention* to plead a counterclaim, that would not suffice, for the pleadings themselves must disclose the controversy, and an averment in the petition would not be competent in ascertaining the amount in controversy.

Arkansas vs. *Kansas Coal Co.*, 183 U. S., 185.

Sturgeon River B. Co. vs. *Sawyer*, 89 Fed., 113.

W. Coyle Co. vs. *Stern*, 192 Fed., 582 (C. C. A.)

Moon on Removal, Sec. 98, note 4.

The mere fact that the petition on removal herein asserted that defendant had a counterclaim exceeding $3,000 in amount and that the amount in controversy exceeded that sum *by way* of a counterclaim, is totally insufficient to have worked a removal, for it is held that in determining the removability of a case the facts showing the same must appear by *plaintiff's own statement* of his claim "and if it does not so appear, the want of it *cannot be supplied* by any statement of the petition for removal or in subsequent pleadings. And moreover that jurisdiction is not inferred by the allegation that defendant *intends* to assert a defence based on the constitution," etc.

Arkansas vs. *Kansas Coal Co.*, 183 U. S., 185.

The entire record on removal being considered in determining the question, and there having been

a failure or omission to submit a defending plea or counterclaim, our argument becomes all the more unanswerable.

As was recently stated:

> "Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. * * * It is not enough that grounds of jurisdiction other than diverse citizenship may be *inferred argumentatively from the statements in the bill*, for jurisdiction cannot rest on any ground that is *not affirmatively and distinctly set forth.*"
>
> *Shulthis* vs. *McDougal*, 225 U. S., 561, 32 Sup. Ct., 704.

The conclusion and assumption of the pleader of what his counterclaim is going to be, as stated in his petition on removal and the affidavit of his attorney, certainly come within the condemnation of the foregoing authorities.

Commenting on the fraility of the very petition in question, Judge Hough says:

> "The petition says in substance that the defendant has counterclaim, without stating what it is. Whatever may be the preferred rule, when in a proper and formal manner the amount in controversy between the parties is

made to appear and shown to exceed $3,000 exclusive of interest and costs;—I feel justified in holding, and do hold, that it is impossible to show that such controversial amount exists in any such manner as this defendant has attempted" (page 53, 76).

It would be absurd to argue, if such an argument is offered, that the answer, *now* a part of the record in *this* Court (page 122, fol. 193), obviates the deficiences pointed out by Judge Hough. For the only matters presented to determine removability is the state of the record at the *time of the filing* of the petition, viz.: October 16, 1915, and not after answer November 8th, 1915 (page 132, fol. 208), a period subsequent to the time defendants-in-error had entered their judgment, on October 26, 1915.

> Alabama S. Ry. Co. vs. Thompson, 200 U. S., 206, 216.

But the plaintiff-in-error argues that it would have been impossible for him to interpose his answer in the State Court so that the same could be made a part of the record for the simple reason that he was required to make his application before his time to answer expired. But that is not the meaning nor construction of the Statute. The Statute particularly says that the party entitled to remove the suit may file such petition in the State Court at or before the time that he is required to plead or answer to the complaint (Judicial Code, Sec. 29). The limitation there is not to the right of the plaintiff-in-error to *file* his answer, but it is the limitation of his time to make application

for removal; that is, while defendant has twenty days within which to serve an answer or counterclaim and has the entire of that time to remove the case in, he may nevertheless serve his answer the tenth or fifteenth day after receiving the complaint or declaration and still have the balance of the time within which to remove. The apparent intent of the Statute is merely to compel a defendant to move promptly and limit his time to within such a period as not to interrupt the plaintiff with the continuance of his proceedings in the Federal Court to which his case is removed.

That such is the effect of the Statute has been repeatedly held in the Federal Courts:

Gavin vs. Vance, 33 Fed., 84;
Doyle vs. Beaupre, 39 Fed. R., 289;
Conner vs. Stogit, 45 Fed., 802;
Brisenden vs. Chamberlain, 53 Fed., 307;
Duncan vs. Associated Press, 81 Fed., 417;
Whetely vs. Sterlingunth, 83 Fed., 853;
Champlain Const. Co. vs. O'Brien, 104 Fed., 930;
Youtsey vs. Hoffman, 108 Fed., 693;
Fearon vs. Lawson (Ky., 1915), 178 S. W., 1121.

So that if the plaintiff-in-error herein could have been allowed to urge a counterclaim, it was his duty to have filed his answer *with or before* he filed his petition and bond on removal, provided it was all done within the time given by the State statutes to plead. This he failed to do in this case and under no circumstances can his counterclaim be

considered, because it was not a part of the record on removal at the time it was certified to the Federal Court on October 20, 1915.

E.

A counterclaim or set-off, even if interposed in an action, cannot be considered in determining the amount in controversy.

It is essential in determining this point to note the extreme difference between the wording of the present Statute (amended in 1887-8) and the Statute as it eixsted before then. The amendment it appears had become necessary because an abuse had grown up in the removal of cases by the injection of puffed, fraudulent or pretended counterclaims.

> *Waco Hardware Co.* vs. *Michigan S. S. Co.*, 91 Fed. Rep., 289.

And in order to "*contract the jurisdiction* of the Federal Courts," the amendment was passed.

> *Arkansas* vs. *Kansas C. Co.*, 183 U. S., 185;
>
> *Missouri Pacific R. R. Co.* vs. *Fitzgerald*, 160 Fed., 556, at page 581;
>
> *W. G. Coyle Co.* vs. *Stern*, 193 Fed., 582 (C.C.A.);
>
> *Glover Mach. Co.* vs. *Jellus-Cooke Co.*, 222 Fed. R., 531 (D. C.).

The three most notable differences in the Statute are, that the removing party can only be the defendant in the State Court; further, the time within which the application must be made must be at a period *prior to* the time that the defendant is required to plead in the State Court action; and thirdly, the case must be one of which the District Courts of the United States have *original* jurisdiction. This may explain the apparent finding by several decisions rendered prior to the 1887 amendment, whose effect is nullified by that amendment.

We have been able to find no case *subsequent* to the 1887-8 amendment which has permitted the set-off or counterclaim to be taken into consideration in determining the removability of a cause; but if there chances to be one, it will be found that it is based on some decision or authority rendered under the old Act which, as above shown, has no further force because of the 1887-8 amendment.

We have been able to find only one case in the Federal Courts where it was squarely held under circumstances like the one involved on this appeal that the counterclaim was permitted to be taken into consideration, and that is the case of

Clarkson vs. *Manson*, 4 Fed. Rep., 257.

Criticising that case, it was later held and even before the amendment of the Removal Acts that if the Clarkson case was good law "the door for removals is wide open whenever a defendant, for purposes of delay or otherwise, chooses to interpose a counterclaim for more than the prescribed

sum; thus drawing into United States Courts the trial, through the device of a counterclaim, of any cause in which the amount claimed by plaintiff although less than $500 is to be determined."

Falls Wire Mfg. Co. vs. *Broderick*, 6 Fed. Rep., 654 (C. C. A.).

But the Clarkson case, in our opinion, was based on the false premise that the removability of a case did not depend on the condition of the record at the commencement of the action, as was there urged, but at the time of the filing of the petition, it appearing that at that time an answer had been interposed containing a counterclaim for an amount exceeding the jurisdictional sum. That premise was wrong because at that time the Courts had uniformly held that removability depended upon the diversity of citizenship at the time of the commencement of the action and not subsequently, as is shown in

LaMontagne vs. *Harvey Lumber Co.*, 44 Fed., 645.

Under the old Statute, as well as the amended one, the clear weight of authority holds that a counterclaim *cannot* be taken into consideration in determining the removability of a State suit.

McKown vs. *Kansas Coal Co.*, 105 Fed., 657;
LaMontagne vs. *Harvey Lumber Co.*, 44 Fed., 645;
Falls Wire Co. vs. *Broderick*, 6 Fed., 654;
Bennett vs. *Devine*, 45 Fed., 705;

Sturgeon River B. Co. vs. *Sawyer*, 89 Fed., 113;
Carrick vs. *Landman*, 20 Fed., 209;
Foster's Fed. Pr. (5th Ed., 1913);
Moon on Removal (1901) Sec. 98;
Eisele vs. *Oddri*, 128 Fed., 949;
Hayne vs. *Wooly*, 180 Fed., 573;
Bailey vs. *Wooly*, 183 Fed., 102.

There are cases which had permitted the counterclaim to be taken into consideration, but different influences and conditions were present in such cases which are absent in this case. Such are cases where, under the earlier statute on removal, a plaintiff was permitted to seek removal to the Federal Court because the defendant in the State Court had interposed a counterclaim in an amount sufficient to bring the case into the Federal Court.

Carson Lumber Co. vs. *Holtzclaw*, 39 Fed., 578;
Wolcott vs. *Watson*, 45 Fed., 529;
Price & Hart vs. *Ellis Co.*, 129 Fed., 482.

Though as to that propositon very respectable authority has denied plaintiff the right to remove.

LaMontagne vs. *Harvey Lumber Co.*, 44 Fed. Rep., 645;
Waco Hardware Co. vs. *Michigan S. Co.*, 91 Fed. Rep., 289;
Illinois Co. vs. *Waller*, 164 Fed., 358;
Glover Machine Works vs. *Cooke-Jellico Coal Co.*, 222 Fed. Rep., 531.

In examining the cases which permit the consideration of the counterclaim it will be found that

diversity of opinion is caused merely by the fact that removal was permitted before the 1887 amendment in such States where the defendant was *bound* to interpose his counterclaim, otherwise he would be barred from ever after claiming under it.

Lee vs. *Continental Ins. Co.*, 74 Fed., 424;
McKeown vs. *Kansas Coal Co.*, 105 Fed., 657.

In the State of New York a defendant is not bound to set up a counterclaim and he is always free and at liberty to institute an independent action on his claim.

Ruppert vs. Haug, 87 N. Y., 141.
Cantoni vs. Forster, 12 N. Y. Misc., 376.
Halsey vs. Carter, 1 Duer, 667.
Brown vs. Gallandet, 80 N. Y., 413.
Lignot vs. Redding, 4 E. D. Smith (N. Y.) 285.
Peck vs. Minot, 4 Robertson (N. Y.) 323.
Gillespie vs. Torrance, 25 N. Y., 306; affirming 4 Bosw., 36.
Inslee vs. Hampton, 8 Hun, 230.

The plaintiff in error cites a line of decisions of which

Harten vs. *Loffler*, 212 U. S., 397.
Export & Import Co. vs. *Port Banga Lumber Co.*, 237 U. S., 388.
Martinez vs. *Int. Bk. Corp.*, 220 U. S., 214

are illustrations. Also a line of decisions following the case of *Hilton* vs. *Dickinson*, 108 U. S., 165,

where in determining the jurisdictional sum for the purpose of appeal of cases from the Circuit Court of Appeals or of the territories, this Court has been called upon to define the term "matter in controversy."

Although in those cases, this Court has held that the controversy is shown by the whole record, which may include a counterclaim this merely refers to this Courts jurisdiction in determining a *review* of Federal Courts decisions and in respect to such matters the Courts have held that the *whole record* must be examined.

Bradstreet vs. *Higgins*, 112 U. S., 227.

Our answer to this argument is best illustrated in considering, for instance the case of *Export & Import Lumber Co.* vs. *Port Banga Lumber Co.*, 237 U. S., 338, above cited. In that case an appeal was taken from the Courts of the Philippine Islands to this Court, by virtue of Acts of Congress under which this Court is given "jurisdiction to review, reverse or affirm * * * the final judgments or decrees of the Supreme Court of Philippine Islands in all actions now pending therein or hereafter determined thereby, in which the Constitution or any statute, treaty, title, right or privilege of the United States is involved or in cases in which the value in controversy exceeds $25,000 * * *." Act of 1902, Sec. 10, Chap. 1369 (32 U. S. Statutes, 691, 695).

This Court very properly held that the value in controversy will be ascertained only from "a consideration of the *whole* record. * * * What is *actually* in dispute herein is the criterion."

This Court therefore determined, as is shown at page 390, that the *issues* which were involved in the *trial* as developed by the evidence, as distinguished from the pleadings, which resulted in the judgment appealed from, was the criterion with which this Court would concern itself. The Court stated the contents of the pleadings merely to show the theory and claim of the appellant; but not with a view of determining the jurisdiction from the pleadings. Were that the Court's intention, it would have, in the opinion, merely referred to the pleadings and suggested that they were the guide which the Court would follow in making its determination. As this Court says, *the whole record* will be searched to ascertain the amount in controversy.

The cases cited by Judge McReynolds hold precisely the same as does the Export case.

The great difference between the cases respecting Appellate jurisdiction and the case at bar is this: On review on appeal the *whole* record must be searched to determine what the amount in controversy really was—not what a party stated it in his pleadings to be, but what the evidence has developed, whereas in the case at bar the very fact that the law with respect to remand make it peremptory that such motion be made *before answer* or counterclaim is put in, clearly shows that the only matter that the Court considers in determining the matter in controversy is the pleadings, as far as they have gone, which in that case can only be the complaint. The Court cannot wait until the trial and determine from the evidence what the matter in controversy really was, nor can it even search the answer, for no answer can be interposed.

This clearly indicates that the intention of Congress was to permit no transfer of a case to this Court unless the jurisdiction of the Court appeared from the bill of complaint.

On the other hand, assuming that under the Act of Congress with relation to appeals above referred to, the complaint demanded $100,000 and a counterclaim demanded another $100,000, yet if the evidence showed that the matter in controversy was really not that much, but together the counterclaim and demand amounted to less than $25,000, the jurisdiction to review would not attach.

It is therefore obvious that the cases respecting Appellate jurisdiction are not authority opposing our contention.

The same comment we have made in reply to the Export case (237 U. S. 388), applies equally to a number of other cases that may be cited by the plaintiff in error herein where there came up for determination the question as to what would be considered as the matter in controversy in determining the jurisdiction of the United States Supreme Court. Such are the cases of.

Ryan vs. *Bradstreet*, 1 Wall., 66;
Hilton vs. *Duknin*, 101 U. S., 165;
Harten vs. *Loeffler*, 212 U. S., 397;
Bradstreet vs. *Higgins*, 112 U. S., 227;
Block vs. *Darling*, 140 U. S., 234;
Burkstaff vs. *Russel*, 151 U. S., 626.

As a text book, already quoted from, says:

"The cases which hold that a counterclaim may be considered in computing the sum in

dispute to determine *appellate jurisdiction* are not in point here. *Bradstreet Co.* vs. *Higgins,* 112 U. S., 227; *Ryan* vs. *Birdley,* 1 Wall., 66. Appellate jurisdiction is determined by the sum or value in dispute at the *end of a suit;* the original jurisdiction of a U. S. Circuit Court, and hence jurisdiction by removal by the sum or value in dispute at the *beginning* of the suit (and which continues to be in dispute when a removal is sought), by the matter put in issue by the bill, complaint, or petition, or, in some jurisdictions, by the damages stated in the original writ."

Moon on Removal, §98, note 4.

It is therefore clear that under the amendment of 1887 a counterclaim, even if one had been interposed herein, can have no influence in determining the jurisdictional amount which would work a removal of a case to the Federal Court.

F.

Even had the plaintiff-in-error in a proper manner and by correct procedure shown that the counterclaim had been properly interposed, in view of the fact that the State Court, in which the defendants-in-error had sought their remedy, had a limit of jurisdiction to enter judgment for no more than $2,000, the $3,000 limit of jurisdiction was not reached.

The plaintiff's suit was for $800. The defendant's counterclaim, assuming that it had been

interposed, was over $3,000. But the New York City Court's jurisdiction of litigation is $2,000 (page 35, fol. 48). So, assuming that the plaintiff-in-error could, by any possibility, recover on his counterclaim, it could not have exceeded the sum of $2,000. Consider with that, the amount of plaintiffs' claim which was $800, it would bring the supposed amount in controversy up to the sum of $2,800, which falls $200 short of the jurisdictional sum.

The Courts of New York have already passed on the question and they have and do hold that under no circumstances may a party enter judgment for more than $2,000 the limit of jurisdiction in the City Court.

> *Lewkowitcz* vs. *Queens Aeroplane Co.*, 207 N. Y., 290 (holding N. Y. Civil Code, Sec. 315 unconstitutional).
>
> *Spitzer* vs. *Greens*, 89 Misc. (N. Y.) 882.

That being so, under no circumstances could the matter in controversy have exceeded in this litigation the sum of $2,800.

The point is a very serious one and has already been directly passed upon in the District Court. In one case a defendant's plea was for the sum of $3,000, but under the State Statutes he could recover no more than $500. The Court held that $500 was the amount of the matter in dispute, and that the Federal Court could not take jurisdiction under the removing acts, assuming that the Court could consider the counterclaim on the removal.

> *N. Y. & I. P. Co.* vs. *Milburn Co.*, 35 Fed. R., 225 (C. C. Tenn.).

It appeared there that defendant set up $3,000 counterclaim, "but not more than $500 of that claim could have been involved in the Court from which this cause was removed for no larger judgment than that could have been rendered in favor of defendant in that (State) Court" (at page 227).

Foster, Fed. Pr. (5 Ed.), §21, page 54.

See also

Hummell vs. Morse, 25 Fed., 380 (C. C.).

It thus appears from the record on removal and as well from the papers on this application, that under no circumstances could the matter in controversy in any event have exceeded $2,800.

POINT VII.

The decisions of the State Court being correct, and the City Court having the right to continue its jurisdiction in the case, the judgment and orders brought here by writ of error should be affirmed, or the appeal dismissed, with costs and disbursements to the defendants-in-error.

Respectfully submitted,

JACOB W. HARTMAN,
Attorney for Defendants-in-Error.

YANKAUS *v.* FELTENSTEIN ET AL.

ERROR TO THE CITY COURT OF NEW YORK CITY, STATE OF NEW YORK.

No. 407. Argued April 10, 1917.—Decided May 21, 1917.

The rule that an order of the District Court remanding a cause is conclusive of the right to remove (Jud. Code, § 28) and cannot be reviewed on writ of error to a subsequent judgment of the state court, applies also when the final judgment of the state court is rendered after the attempted removal and before the order of remand, if when the judgment is rendered the District Court has not assumed jurisdiction and assumes none later beyond enjoining further proceedings until the motion to remand may be decided.

Conduct of the plaintiffs in respect of proceedings in the state courts and District Court *held* not to have estopped them from contesting the jurisdiction of the latter after attempted removal, or to have waived their right to the conclusive effect of the order of remand.

Affirmed.

THE case is stated in the opinion.

Mr. Jesse C. Adkins, with whom *Mr. Roger Foster* and *Mr. Frank J. Felbel* were on the briefs, for plaintiff in error.

Mr. Jacob W. Hartman for defendants in error, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error, bringing into review a judgment of the City Court of the City of New York and an order of that court denying a motion to set aside this judgment, and an order of the Appellate Term of the Supreme Court of the State of New York, which affirmed the order and judgment.

The action was brought in the City Court by Feltenstein and Rosenstein, hereinafter called the plaintiffs, to recover a contingent counsel fee of $500 from Yankaus, hereinafter called the defendant, and for loans of $200 and $100 respectively, in all the sum of $800. Summons and complaint were served on October 11, 1915. On October 16, 1915, the defendant filed in the office of the clerk of the City Court petition and bond for the removal of the cause to the United States District Court for the Southern District of New York. The bond was approved by a judge of the City Court. Notice of the intention to file petition and bond was served on the plaintiffs on October 15, 1915. The ground for removal was diversity of citizenship, and it was averred that the petitioner had a counterclaim exceeding the sum of $3,000, exclusive of interest and costs, and that therefore the matter and amount in dispute in the case exceeded that sum. On October 20, 1915, a certified copy of the record was filed in the office of the clerk of the United States District Court for the Southern District of New York, and an answer was filed setting up the invalidity of the agreements upon which plaintiffs' cause of action was based and asserting a counterclaim.

On October 16, 1915, plaintiffs moved in the City Court for an order setting aside the bond and the removal of the

cause to the United States District Court and directing that the City Court retain jurisdiction. This motion came on to be heard before a judge of the City Court on October 20, 1915, and resulted in an order setting aside the removal and determining that the action was not entitled to be removed. This decision was made upon the basis that the counterclaim could not be considered in determining the amount in dispute, in so far as to give the federal court jurisdiction. Judgment was entered on October 26, 1915, for plaintiffs. From this order and judgment appeal was taken to the Supreme Court, Appellate Term. Thereupon, the defendant moved in the United States District Court for the Southern District of New York for an order restraining the plaintiffs from proceeding to the enforcement of the judgment. The matter was heard before Judge Lacombe, sitting as District Judge, and on November 4, 1915, he issued an order restraining the plaintiffs until further order made on proper notice and motion to remand from in any way proceeding with or prosecuting their cause of action in the City Court or from collecting anything under any judgment entered therein. Subsequently plaintiffs moved in the United States District Court for the Southern District of New York for an order remanding the case to the state court. This motion came on for hearing before Judge Hough, who granted the motion to remand and an order remanding the cause to the City Court was made on the fifteenth day of November, 1915. The defendant afterward moved in the City Court to set aside the judgment rendered while it was alleged the suit was pending in the United States court, which motion was denied.

Appeal was thereupon taken to the Supreme Court, Appellate Term, and the judgment and the order setting aside the removal and declaring that the case was still in the City Court were both affirmed. Motion was made by the plaintiffs to dismiss the appeal upon the ground

that the order denying the defendant's motion to vacate the judgment had become academic by the affirmance of the order setting aside the removal. The appeal was dismissed by the Appellate Term. Defendant thereupon applied to the Appellate Term for leave to appeal to the Appellate Division from the order affirming the order of the City Court, setting aside the removal of the action, and from the judgment entered by the plaintiffs while the action was in the federal court, and also from the dismissal of the appeal from the order refusing to vacate this judgment. Both motions were denied. Defendant then applied to a Justice of the Appellate Division, First Department, for an order permitting him to take appeals, and these applications were denied. In these applications the defendant set forth that he had been denied rights asserted by him under the Constitution and statutes of the United States. Afterwards a writ of error was allowed from this court.

As we view this case, we think the judgment of the court below must be affirmed, as this proceeding is practically an attempt to review an order remanding a cause attempted to be removed to the District Court of the United States. Section 28 of the Judicial Code provides that "whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed." After the filing of the transcript in the United States District Court the matter came on for hearing before Judge Lacombe, and it was ordered that until the further order of the court the plaintiff should be enjoined and restrained from proceeding in the City Court, or from collecting in any manner any

judgment entered therein. Accompanying this order Judge Lacombe wrote the following memorandum:

"Jurisdiction is too doubtful to warrant this court in retaining the cause. *Crane Co.* v. *Guanica Centrale*, 132 Fed. Rep. 713. Plaintiff's proper course would have been to make a motion to remand. This he may now do. When such motion is made and granted the cause may proceed there; it is now here. Plaintiffs in the meanwhile may be enjoined (until remand is made) from proceeding further in the State Court."

We think the effect of this order, read in the light of the opinion, simply manifested the purpose of the court to prevent proceedings while the question of the jurisdiction of the United States court was pending, and did not amount to a decision that that court had jurisdiction. It is true that an order of injunction was granted; but it is apparent from a reading of Judge Lacombe's memorandum that his purpose was merely to enable the District Court to hold the case until it decided the question of its jurisdiction. Afterwards the motion came up in the United States District Court, in which an opinion was delivered by Judge Hough, wherein he said:

"When this matter was argued the record on removal was not in court. If it had been the motion would not have been held until now. The opinion of Judge Lacombe in *Crane Co.* v. *Guanica Centrale*, 132 Fed. Rep. 713, merely states what for many previous years had been the practice of this Court,—i. e. doubtful cases were always remanded.

"Rulings of this nature are admittedly unsatisfactory. Counsel and parties are entitled to a clear-cut statement of the law if it is possible to make one;—and it would seem as if the removal acts were sufficiently old by this time to enable a court to select what appeared to be the best of conflicting rules.

"Since no case (irrespective of amount involved) can

be removed over which the United States Court might not have had original jurisdiction, it has always seemed to me illogical to consider a counterclaim in ascertaining the propriety of removal or remand.

"In the State of New York there is no compulsion on a defendant to set up a counterclaim. It is always optional with the party possessing it to reserve his affirmative demand for an independent suit.

"Imagine this action brought originally in this Court; the defendant would only have been obliged to appear and move on the pleadings to dismiss the complaint without prejudice. Such a motion would have been granted as of course.

"Thus it appears that an action of the most trifling nature may (under defendant's contention) be removed to this Court at the option of defendant if he can assert a counterclaim of sufficient size. That this was never the intent of the statute I am clear. Considering, however, the confusion of decisions and (so far as I know) the failure of late years to observe the difference between the Act of 1875 and that of 1888, I should have felt impelled to consider and classify decisions were it not for the consideration next to be stated. If it be true that by a preponderance of rulings the affirmative claims set up in an answer are to be considered in determining jurisdiction, it is at least necessary that somewhere and in some shape the defendant who sets up counterclaims shall plead them in a manner which enables his opponent to criticise them, modify them or expunge them as may be proper under the rules of good pleading.

"In this case,—and in any similar case under the Act of 1888 there is no answer. The only knowledge that to this moment plaintiff has regarding defendant's counterclaim is contained in the petition for removal,—the language of which petition sets forth no reason whatever for the recovery by the defendant from the plaintiff of any

sum of money at all. The petition says in substance that the defendant has a counterclaim, without stating what it is. Whatever may be the preferred rule, when in a proper and formal manner the amount in controversy between the parties is made to appear and shown to exceed $3,000 exclusive of interest and costs;—I feel justified in holding, and do hold, that it is impossible to show that such controversial amount exists in any such manner as this defendant has attempted."

For the reasons stated, the case was remanded to the City Court. We think these orders, with the accompanying memoranda and opinion, taken together, show that the District Court denied its jurisdiction, and remanded the cause to the City Court. In this attitude of the case, the judgment of the state court must stand, as the effect of the orders of the District Court was to hold the attempted removal unauthorized. This court has more than once held that such an order is not subject to review, directly or indirectly, but is final and conclusive. *Missouri Pacific Ry. Co.* v. *Fitzgerald*, 160 U. S. 556, 580–583; *McLaughlin Brothers* v. *Hallowell*, 228 U. S. 278, 286; *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U. S. 440, 447.

Nor are we able to find anything in the conduct of the plaintiffs estopping them from contesting the jurisdiction of the federal court, or amounting to a waiver of their right to the benefit of the judgment remanding the case from the District Court.

It follows that the judgment of the City Court of the City of New York must be

Affirmed.

MR. JUSTICE PITNEY concurs in the result.